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VOLUME IV

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 50

EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL., PETITIONERS,

vs.

NOERR MOTOR FREIGHT, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1960
CERTIORARI GRANTED APRIL 18, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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EASTERN RAILROAD PRESIDENTS CONFERENCE, ET AL., PETITIONERS,

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"RESOLVED, That the Pennsylvania State Grange go on record as being in favor of holding fast to the present weight limit of [illegible],000 pounds for trucks and trailers, and that the law be strictly enforced."

In compliance with this action, the officials of the Pennsylvania State Grange not only opposed the Big Truck Bill, but introduced a Weight-Distance Highway Use Tax measure, patterned after those of Oregon and New York. The results of the Maryland Highway Test, the studies of the Highway Department of Ohio on the destruction of roads due to the increased weights and overloading, were studied. These facts, together with statistics secured from our own Pennsylvania Division of Motor Vehicles were presented in editorials, personally written by your editor, and published in the Pennsylvania Grange News for March, May and June, 1951. Secretary Mahood also published a front page article in the June 1951 issue. Reprints of these editorials were supplied to every Senator and Representative as well as to the Governor, while the bill was still under consideration by the Legislature. In this opposition, we were joined by the state organizations of Township Road Supervisors, The Motor Clubs of Pennsylvania, Federation of Women's Clubs, and numerous other civic organizations, and the railroads. The facts presented by the Grange and these organizations, particularly the data revealed by the Maryland Test, finally led Governor Fine to veto the bill. Were all those opposed, "duped"?

EXHIBIT D-62

"Most of the fertilizer which I haul is delivered to farms and must be transported over county roads and rural bridges, the majority of which permit only a stated maximum weight. The legal maximum weight on bridges in Cumberland and Dauphin Counties over which I must drive does not permit me to load 20,000 pounds. I find this posting of maximum weights on roads and bridges to be more of a problem everyday, and therefore, if I am to operate without violating the law, it is imperative that I load only 16,000 pounds of fertilizer for delivery to farms."

By inference, the PMTA attempts to convey the impression that by the mere act of signing a bill to increase truck weights, our Governor simultaneously would increase the strength of bridges so as to enable them to carry substantially heavier loads. This inference is on a par with their contention that the Grange officials were "duped" into opposing the Big Truck Bill. They purposely overlook the fact that the Grange members and officers were aware of the destruction being wrought upon our highways by the huge overloaded trucks long in advance of the date that supposedly we were influenced or duped.

In accord with the expressed desire of the Grange members, we shall continue our opposition to further damage of our roads by increased truck loads. We shall work for stricter enforcement and heavier fines, graded to the extent of the overloading, and we shall urge the enactment of a more equitable and fair type of tax with which to construct and maintain the heavier type of roads demanded by present day traffic.

You can assist by letting your Representatives and Senators elect know your stand on this issue before election day, November 4th. A resolution, stating the stand of your Grange should be published in your local paper. A similar resolution, forwarded to the State Grange Session at Allentown, will strengthen the hands of your elected Grange officers and legislative committee.

Fraternally yours,

/s/ Beatty H. Dimit
Beatty H. Dimit, Master
The Pennsylvania State Grange

532b

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,750

NOERR MOTOR FREIGHT, INC., et al., Appellants,

—v.—

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.

APPEAL FROM THE DECREE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Appellants' Appendix—Filed November 26, 1958

[File endorsement omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOCKET ENTRIES

1/17/53	Complaint filed.
3/30/53	Answer of Pennsylvania Railroad Co., filed.
1/28/54	Order of Court granting motion of D. F. Bast, et al., to intervene as parties plaintiff, filed.
10/ 8/57	Plaintiffs' requests for findings of fact and conclusions of law holding defendants liable for violating the antitrust laws (filed with Judge Clary 3-14-57), filed.
10/10/57	Opinion Sur Pleadings & Proof, with findings of fact and conclusions of law, granting injunctive relief and awarding certain damages, etc., filed.
7/22/58	Final decree.
8/18/58	Notice of appeal by plaintiffs, filed.
8/27/58	Order of Court extending time for docketing the appeal filed by defendants on 7/31/58 and the appeal filed by plaintiffs on 8/18/58 to 10/27/58 filed.

[fol. 2]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed January 17, 1953

1. The plaintiffs, other than the plaintiff Pennsylvania Motor Truck Association, said plaintiffs being hereinafter called "Truck Operators", are each engaged in the trucking business in Pennsylvania or operate regularly through Pennsylvania, each one operating trucks in inter-city and interstate long distance hauling. Most of the plaintiffs are

members of the plaintiff Pennsylvania Motor Truck Association, which is hereinafter described, and all of the plaintiffs bring this action on behalf of themselves and all others similarly situated, of which the class is too numerous to appear before the court in its entirety. The plaintiffs constitute a substantial and adequate representation of said class.

2. The plaintiff Pennsylvania Motor Truck Association is a corporation chartered under the Act of April 29, 1874, and its supplements, on April 24, 1928, by Judge T. D. Finletter of the Court of Common Pleas No. 4 of Philadelphia County, having its principal office at the 7th Floor, Telegraph Building, Harrisburg, Pennsylvania. This Association, hereinafter called the PMTA, which has chapters in every county of the Commonwealth of Pennsylvania, consists primarily of operators of motor trucks who operate in or through Pennsylvania, including industries operating their own trucks as well as those operating trucks for hire.

3. The defendant, Eastern Railroad Presidents Conference, hereinafter called "Conference", is an unincorporated association, having offices at 230 Park Avenue, New York 17, New York, and 143 Liberty Street, New York, New York. The membership of the Conference includes, as its backbone, the presidents or trustees of approximately 35 railroads in 17 eastern states of the United States, operating north of the Potomac and east of the Ohio rivers. The presidents and trustees officially represent their respective [fol. 3] railroads in the Conference, which is supported, maintained and utilized by said railroads.

4. The Conference maintains a permanent functioning organization and a staff of paid personnel; it has regular meetings of its members, and has recently appointed David I. Mackie as permanent chairman at a salary of about $45,000 a year. The Conference operates through a number of Committees and sub-Committees, including a Committee on public relations, and also maintains a Bureau of Information at Room 5710 Grand Central Terminal, New York 17, New York.

5. The respective Railroads are regularly assessed for the cost of operating the Conference, assessments being

made on a trackage basis, so that the Conference is largely supported by the Big Railroads, such as the Pennsylvania Railroad Company, the New York Central, the Reading Railroad Co., the Baltimore and Ohio, and the Chesapeake and Ohio, which in turn dominate the Conference.

6. The aforesaid Committee on Public Relations of the Conference maintains an office at 143 Liberty Street, New York 6, New York, and currently its members are: defendant William White, Chairman of the Committee and President of the New York Central system; defendant John J. Fitzgerald, Vice-Chairman of the Committee; defendant Walter S. Franklin, President of the Pennsylvania Railroad Company; defendant W. J. Tuohy, President of the Chesapeake and Ohio Railway Co.; defendant R. B. White, President of the Baltimore and Ohio Railroad Co.; defendant P. W. Johnston, President of the Erie R. R. Co.; defendant P. M. Shoemaker, President of the D. L. and W. R. R. Co.; defendant C. M. Hutchins, President of the Bangor and Aroostook R. R. Co.; and defendant L. L. White, President of the New York, Chicago and St. Louis R. R. Co. The public relations department of the Confer- [fol. 4] ence has at all times material hereto been run by the aforesaid defendant, John J. Fitzgerald, subject to the direction of the Conference and the aforesaid Committee. In its participation in the illegal conspiracy hereinafter to be alleged, this Committee, together with its members, regularly held meetings in the Reading Terminal, Philadelphia, Pa., during a period when R. W. Brown of the Reading Railroad was its Chairman.

7. On or about May 24, 1949, in furtherance of the conspiracy hereinafter to be alleged, the Conference also appointed a Special Committee on Competitive Transportation, hereinafter called the Competitive Transportation Committee, to be assisted by sub-Committees of Counsel, Research and Public Relations. The members appointed to the Competitive Transportation Committee were the following: defendant M. W. Clement, then President of the Pennsylvania R. R. Co.; defendant G. Metzman, then President of the New York Central; defendant R. B. White, President of the Baltimore and Ohio R. R. Co.; defendant

William White, President of the Delaware, Lackawanna and Western R. R. Co.; defendant L. F. Whittemore, President of the New York, New Haven and Hartford R. R. Co.; and defendant W. J. Tuohy, President of the Chesapeake and Ohio R. R. Co. Said W. J. Tuohy was selected as Chairman of the Committee.

8. The individual defendants, except as herein otherwise alleged, are respectively present or past presidents or trustees of the defendant railroads, and are members of the defendant Conference. The defendants T J. Ross, Thomas Deegan and John J. Fitzgerald were at all times material hereto key members of the Public Relations Committee of the Conference.

9. The defendant railroads, hereinafter called the Railroads, include the giants in the passenger and freight trans- [fol. 5] portation industry in the northeastern area of the United States, accounting for 80% of the freight transportation in that area. All of them regularly transact business or maintain regular offices for the conduct of their business in Pennsylvania.

10. The defendant Carl Byoir and Associates, Inc., hereinafter called Byoir, is a New York corporation, engaged in business as a publicity agent, with its principal office at 10 East 40th Street, New York. Byoir regularly transacts business in Pennsylvania.

11. This case arises under the anti-trust laws of the United States, and more particularly under Sections 1 and 2 of the Act of July 2, 1890 (26 Stat. 209, 15 U. S. C. A. Secs. 1; 2), commonly known as the Sherman Act. Jurisdiction thereof is conferred upon this Court by Section 7 of said Act, and by Sections 4, 12 and 16 of the Act of October 15, 1914, as amended (38 Stat. 731, 736, 737, 15 U. S. C. A. Secs. 15, 22 and 26), commonly known as the Clayton Act.

12. The defendant railroads have, over a period of years, culminating in the acts herein averred, sought by divers means to obstruct, hamper and impede interstate transportation by motor vehicle, in which plaintiffs and

others are engaged as a development in the art of transportation providing improved efficiencies and more economical and flexible means of carriage of freight and passengers, the purpose and objective of the concerted action of defendants being to maintain a monopoly of transportation, by means of their own facilities, by destroying interstate competitive highway transportation, through fomenting governmental restrictions and undermining public confidence in this newer form of transportation—all to the detriment and irreparable harm and damage to the plaintiffs, the users of their facilities, and the economy of Pennsylvania.

[fol. 6] 13. In or about May, 1949, the defendant Railroads embarked upon an illegal conspiracy, in violation of the civil and criminal provisions of the anti-trust laws of the United States, aimed at destroying the plaintiffs and those similarly situated, as competitors in the field of the hauling of freight, and at carrying out exclusive, monopolistic spheres of operation in the freight transportation business of the United States, so that the Railroads would have a monopoly on freight hauling in interstate commerce.

14. The agency through which the Railroads worked for effectuating the aforesaid monopolistic conspiracy was the defendant Conference, consisting of the Presidents of all of the interested Railroads, its various committees, subcommittees, and their members, as hereinbefore described, which pursuant to and in furtherance of the aforesaid conspiracy, performed or procured the performance of all of the acts hereinafter alleged.

15. In or about May, 1949, the defendant Conference, having appointed its Committee on Competitive Transportation as an instrumentality for the carrying out of the conspiracy, retained the defendant Byoir as publicity agent for the express purpose of carrying the conspiracy into effect, and at all times material hereto, the defendant Conference, its committee on public relations and the individual members thereof, its committee on competitive transportation and the individual members thereof, the defendant railroads, the defendant presidents and trustees, and other individual defendants, and the defendant Byoir, together

with divers other persons to the plaintiffs unknown, have acted in combination and concert to achieve the goal of the conspiracy.

16. The defendant Byoir was given carte blanche by the defendant Conference and its members, on behalf of the defendant railroads, to carry out their illegal conspiracy to [fol. 7] monopolize freight transportation, and defendant Byoir immediately instigated a vicious, corrupt, and fraudulent campaign against the plaintiffs and others similarly situated, with the complete knowledge, consent and approval of each and every other of the other defendants, designed to impede their operations in every way possible, and ultimately to deprive them of any freight business. The means of this campaign, which will hereinafter be alleged in more detail, include the following:

(a) Bribery of public officials;

(b) Bribery of the officials of independent organizations;

(c) Formation of "independent" citizens organizations to circulate false and malicious propaganda composed and prepared by Byoir for the railroads, attacking the plaintiffs, without disclosing the participation of the railroads;

(d) Use of existing "independent" citizens organizations for the same ends;

(e) Vilification and defamation of the plaintiffs by the circulation to the public generally, to public officials, and to suppliers and customers of the plaintiffs, of false and malicious reports of and concerning the plaintiffs in their business of hauling freight.

(f) Unfair competition with the plaintiffs by all of the above means.

Whenever the dissemination of false and malicious reports or propaganda is referred to in this Complaint, it includes such statements as the following: that the plaintiffs are unreliable, untrustworthy and inefficient in the conduct of their business as haulers of freight; that the plaintiffs have a reckless disregard for the laws of the

states through which they travel, creating an extreme hazard to all other users of the highways; that the plain-
[fol. 8] tiffs are deliberately ruining the highways and rural roads of said states; that the plaintiffs are delinquent in paying their share of the cost of upkeep of the highways; that the plaintiffs are dishonest in their business methods, being "Five per centers", who use bribery and corruption of public officials to gain their ends; that plaintiffs are not fit to serve the industry of the Country in the long-distance hauling of freight, and so forth.

17. As part of this campaign, aimed at monopolizing the freight business for the benefit of the defendant railroads, and at driving the plaintiffs and others similarly situated out of the transportation industry, pursuant to the conspiracy of, and in conspiracy with and with the knowledge and approval of the other defendants, the defendants acting through the defendant Byoir did the following, in the states of New York, New Jersey, Pennsylvania, and elsewhere, intending to inflame public opinion against and do injury to the plaintiffs, without disclosing that it was being done on behalf of and at the direction of the Railroads.

(a) Organized "citizens" groups, like the Empire State Transport League, of 11 North Pearl Street, Albany, New York, the New Jersey Citizens Tax Study Foundation, of 9 West Park Street, Newark, New Jersey, which had a key Byoir employee as its secretary and one of its trustees, and other such associations, all of which purported to be independent citizens organizations expressing independent views, but which in actual fact were formed and availed of solely for the fraudulent purpose of disseminating false and malicious propaganda against the plaintiffs and for the fraudulent purpose of creating the false impression publicly that there was bona fide independent protest against the trucking industry.

(b) Availed itself of existing citizens groups, such as the New Jersey Automobile Owners, Inc. of 155 Evergreen Place, East Orange, New Jersey, and the Citizens Tax League, of 16 State Street, Rochester, New York, as in-
[fol. 9] struments for the fraudulent purpose of disseminat-

ing the same false and malicious railroad propaganda against the plaintiffs and for the fraudulent purpose of giving the public and public officials the false impression that *there were bona fide independent protests against the trucking* industry.

(c) Obtained access to such influential groups as the Pennsylvania State Grange and the Pennsylvania Association of Township Supervisors, which also became instruments for the dissemination of the aforesaid railroad attacks on the plaintiffs, through corruption of certain of their officials.

18. For all of these groups, and others like them, the Byoir organization prepared, composed and planned in its offices in New York and elsewhere, propaganda releases, which were published as though they emanated from the respective groups. Byoir took special pains to assure that material supposed to originate in New Jersey and Pennsylvania should be mailed from those states, thereby engaging in a systematic scheme to defraud the public through the use of the United States mails. One such release, composed by Byoir, was issued over the name of Artemas Leslie, Insurance Commissioner of Pennsylvania.

19. Byoir agents, throughout the Commonwealth of Pennsylvania, as well as in New York and New Jersey, also approached motor groups and automobile clubs, real estate boards, economy groups, service groups, safety groups, municipal officials, rural road improvement groups, and others, to agitate them with their intentionally false propaganda against the plaintiffs, concealing the fact that they were doing so on behalf of the Railroads.

20. In 1951 the activities of the defendants, in pursuance of their conspiracy, reached a climax in Pennsylvania, where what was known as the "Fair Truck Bill", officially Senate Bill 615, came before the General Assembly. The object of this bill was to put the plaintiffs and other [fol. 10] Pennsylvania truck operators on an equal footing with truck operators in the surrounding states of New York, Ohio, New Jersey, Delaware and Maryland, by raising the legal weight limit for tractors and tandem-axle semi-trailers.

All of these states permit truck weight limits of 60,000 lbs. or more, whereas Pennsylvania has a limitation of 45,000 lbs.

21. Acting under the Railroad conspiracy herein alleged, the full force of the Byoir organization was immediately used against the Bill. When these efforts failed, and the Bill passed both House and Senate, the Byoir agency then instigated a campaign to bring about the vetoing of the Bill by Governor Fine. To that end, Byoir mobilized the protest of and composed releases for numerous organizations, including the Pennsylvania State Grange, the Pennsylvania Association of Township Supervisors, and others, attacking the Bill and attacking the plaintiffs and others in their situation. The Governor, naturally assumed that this was a bona fide and independent grass-roots protest, whereas in actual fact it was all plotted, created, and master-minded in the Byoir office at the behest of the Railroads. To some of the "independent" protest groups, Byoir gained access by Bribery of their officials, who sacrificed the interests of their members to serve Byoir's ends.

22. An important consideration in Governor Fine's vetoing of S. 615 was the Maryland Road Test No. 1, an experimental test of the effect of truck traffic on highways, being conducted under the sponsorship of eleven states, including Pennsylvania. The Byoir organization, as an alternative to defeating passage of S. 615, set out to delay its passage until the aforesaid Maryland test should be completed, because Clinton M. Johnson, public relations agent of the State Highway Commission of the State of Maryland, was receiving payments from Byoir, in return for which he had agreed to and did in fact publish a misrepresented and distorted account of the test to the dis-
[fol. 11] advantage of the truck operators before the official analysis of the results was made on April 1, 1952.

23. On the basis of the railroad-organized protests, which he assumed to be independent of the Railroads, and the aforesaid misrepresentation of the Maryland Road Test, which was widely publicized by Byoir, Governor Fine vetoed the Bill on January 21, 1952.

24. In furtherance of the campaign, Byoir, in addition to bribing public officials and officials of organizations, also had members of its staff join so-called independent organizations to direct and control their activities; bought and paid for "independent" newspaper columnists to carry their false message; financed farm radio net-works in order to put pressure on farm groups, all as instruments of the said defendants' false propaganda, as hereinafter described.

25. In furtherance of the campaign, Byoir deliberately smeared those of the plaintiffs who are long-distance truck operators by labelling them as "five per centers", to take advantage of the nefarious connotation of that term simply because the operators of long-distance trucks account for approximately 4.7% of the business done by the trucking industry, which has no connection whatever with the meaning of the term "five per center".

26. In furtherance of the campaign, Byoir approached suppliers and customers of the plaintiffs, and disparaged the plaintiffs to them, as they had in all of their public propaganda hereinabove alleged, by falsely and maliciously stating to them that the plaintiffs were engaged in a business which was wrecking the highways and rural roads of Pennsylvania and other states through which they travelled; that the plaintiffs constituted an extreme hazard on the highways; that the plaintiffs did not pay their fair share of the cost of maintaining the highways, and so forth.

27. The conspiracy of all of the defendants against the plaintiffs is continuing unabated to this day, with a par- [fol. 12] ticular view to the 1953 session of the Pennsylvania General Assembly, which has just opened, and where the Railroads hope to achieve the same result that they did with the Governor's veto in 1952 by the same illegal and clandestine methods.

28. All of the acts herein set forth performed pursuant to the conspiracy of the defendants, have resulted in disparaging the plaintiffs' business in the public mind, in creating great public hostility to the plaintiffs, in impeding plaintiffs in the legitimate conduct of their business and

legitimate furtherance of their business ends, in preventing the passage of legislation beneficial to the plaintiffs, and in financially damaging the plaintiffs, both by increased expense of operation, loss of accounts, and loss of profits and prospective profits.

29. All of the acts herein set forth performed pursuant to the conspiracy of the defendants, in addition to damaging the business and interests of the plaintiffs, have greatly injured the public interest and will in the future tend increasingly to do so by monopolizing the hauling of freight in interstate commerce, resulting in increasing the cost to shippers and consumers of all commodities necessary to life, including clothing and food, a high percentage of which reaches consumers only by carriage in motor trucks. A fundamental aim of the conspiracy of the defendants has been to maintain high freight rates in interstate commerce, and to prevent any reduction therein which would naturally result from the normal process of competition.

30. The plaintiffs have suffered damages and will in the future suffer loss, damage and injury as hereinabove specified by reason of the facts complained of herein, the illegal acts and unlawful conspiracy of the defendants. The damages to each respective plaintiff cannot at present be measured with exactness and precision, because of the nature of the injuries done to them, for which the defen [fol. 13] dants are solely responsible. The damages to the class represented by the plaintiffs are, when trebled under the anti-trust laws, in excess of $250,000,000.

31. Each plaintiff is suffering and will continue to suffer irreparable harm and injury unless the defendants are enjoined from the practices complained of herein or any other practices pursuant to their conspiracy.

Wherefore, plaintiffs demand:

1. That each and every one of the defendants, their subsidiaries, affiliates, and successors, and their officers, employees, committees and agents, or any persons acting in concert with them, be enjoined and restrained from doing any of the following, or taking any action furthering or

intended or reasonably calculated to further, the accomplishment of any of the following, pursuant to or in furtherance or continuance of the conspiracy herein alleged:

(a) Preparing, composing or publishing any release relating to the plaintiffs or their business without disclosing that it has been prepared, composed or published by or on behalf of the defendant railroad;

(b) Disseminating any information, disparaging the plaintiffs or their business to any persons or groups without disclosing that the information is being disseminated on behalf of the defendant railroads;

(c) Employing the defendant Byoir or anyone else to conduct an undercover campaign against the plaintiffs and their business;

(d) Organizing or using any non-railroad associations as instruments for circulating disparaging information about the plaintiffs or their business.

(e) Making payments, whether by way of salary, expenses, bribes, or of any other nature, to any officials of any public or private organizations to induce them to adopt [fol. 14] and propagate the position of the railroads against the plaintiffs or their business.

(f) Exerting or attempting to exert any pressure on the legislature or Governor of the Commonwealth of Pennsylvania through the medium of front organizations, against the plaintiffs or their business.

(g) Employing any of the devices or techniques described in the complaint for the purpose of injuring the plaintiffs in their business as haulers of long-distance freight.

(h) Doing any other act or thing to further the combination and conspiracy herein alleged or to accomplish the objects and purposes thereof.

(i) Combining or conspiring among themselves or with any other person to restrain, restrict, limit or prevent the growth, development, or expansion of the plaintiffs as com-

petitors in interstate commerce with them or any of them, or so combining or conspiring otherwise to restrain, restrict, limit or prevent, the plaintiffs' competition in interstate commerce with them or any of them.

2. That pending the trial of this cause, this Honorable Court grant a preliminary injunction in the respects above prayed for, and such other temporary, preliminary or interim relief as the necessities of the case may from time to time require.

3. That each and every one of the defendants be required to pay to each of the plaintiffs damages in an amount to be determined at the trial of this action.

Robert McCay Green, 2635 Fidelity-Phila. Trust Bldg., Philadelphia 9, Pennsylvania, Attorney for Plaintiffs.

[fol. 15]

IN UNITED STATES DISTRICT COURT

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY TO COMPLAINT—Filed March 30, 1953

Defendant, The Pennsylvania Railroad Company, in answer to the Complaint filed in the above case, avers:

First Defense.

1. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 1 of the Complaint.

2. This defendant admits that The Pennsylvania Motor Truck Association was chartered as averred in paragraph 2 of the Complaint, but it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 2 of the Complaint.

3. This defendant admits that the Eastern Railroad Presidents Conference is unincorporated, that it has offices at 143 Liberty Street, New York, N. Y., that its membership includes the presidents of approximately 35 railroads

in the Eastern part of the United States, and that its expenses are paid by said railroads, but denies the remaining averments of paragraph 3 of the Complaint.

4. This defendant denies that the Conference operates through a number of committees and subcommittees, including a committee on public relations, but admits the remaining averments of paragraph 4 of the Complaint.

5. This defendant admits that the respective railroads are regularly assessed for the cost of operating the Conference, but denies the remaining averments of paragraph 5 of the Complaint.

6. This defendant denies the averments of paragraph 6 of the Complaint.

[fol. 16] 7. This defendant admits that on May 19, 1949 the Conference appointed a committee known as the Competitive Transportation Committee, to be assisted by subcommittees designated Legal, Research and Public Relations; that W. J. Tuohy was Chairman of the Competitive Transportation Committee and that the persons named in paragraph 7 of the Complaint were, among others, members of that Committee, but denies that the said Committee was appointed either in furtherance of any conspiracy alleged in the Complaint or of any other conspiracy whatsoever.

8. This defendant denies the averments of paragraph 8 of the Complaint.

9. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 9 of the Complaint.

10. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that Byoir regularly transacts business in Pennsylvania, but admits the remaining averments of paragraph 10 of the Complaint.

11. This defendant is advised that the averments of paragraph 11 of the Complaint are conclusions of law which require no answer, but, to the extent that they constitute averments of fact, denies them.

12. 13. 14. 15. 16. 17. 18. 19. This defendant denies the averments of paragraphs 12, 13, 14, 15, 16, 17, 18 and 19 of the Complaint.

20. This defendant admits that the States of New York, Ohio, New Jersey, Delaware and Maryland permit gross truck weight limits greater than those permitted by Pennsylvania, but denies the remaining averments of paragraph 20 of the Complaint.

[fol. 17] 21. This defendant denies the averments of paragraph 21 of the Complaint.

22. This defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that an important consideration in Governor Fine's vetoing of S. 615 was the Maryland Road Test No. 1. This defendant avers, however, that, although that was only one of the factors mentioned by the Governor in his message setting forth his reasons for his disapproval of the bill, a copy of which is attached hereto marked "Exhibit A", that factor, or any one of said factors, would have justified his so doing. This defendant further avers that the Maryland Road Test conclusively established that the damage to the highways of Pennsylvania caused by the plaintiffs' and others' trucks would have been enormously increased if S. 615 had become law. This defendant denies the remaining averments of paragraph 22 of the Complaint.

23. This defendant admits that Governor Fine vetoed S. 615 on January 21, 1952, but denies the remaining averments of paragraph 23 of the Complaint.

24. 25. 26. The defendant denies the averments of paragraphs 24, 25 and 26 of the Complaint.

27. 28. This defendant denies the existence of any conspiracy, either as averred in paragraphs 27 and 28 of the Complaint or otherwise, and denies the remaining averments of paragraphs 27 and 28 of the Complaint.

29. This defendant denies the existence of any conspiracy, either as averred in paragraph 29 of the Complaint or otherwise, denies that anything done by the defendants

or any of them will monopolize or tend to monopolize the hauling of freight in interstate commerce, and also denies the remaining averments of paragraph 29 of the Complaint.

[fol. 18] 30. This defendant denies that it or any of the defendants is guilty of any illegal act or unlawful conspiracy and also denies the remaining averments of paragraph 30 of the Complaint.

31. This defendant denies the averments of paragraph 31 of the Complaint.

Second Defense.

32. This defendant avers that the plaintiffs are not entitled to bring this action on behalf of themselves and all others similarly situated.

Third Defense.

33. The Complaint fails to state a claim against this defendant upon which relief could be granted.

Fourth Defense.

34. The Complaint purports to set forth a cause of action for libel, slander, disparagement, and unfair competition, as to which the Court lacks jurisdiction since the citizenship of the parties is not diverse.

Fifth Defense.

35. For further answer this defendant avers that the characterization by the plaintiffs of Senate Bill 615 as the "Fair Truck Bill" was a deliberate attempt to deceive both the general public and the members of the Legislature of Pennsylvania, to distract their attention from the inequities and inadequacies of that bill and to create the false impression in their minds that the enactment of Senate Bill No. 615 would not increase the damage done to the roads of Pennsylvania by heavy trucks.

36. This defendant further avers that heavy trucks operated by the plaintiffs and others are causing enormous [fol. 19] damage to the roads of Pennsylvania and of other

states—which damage is vastly in excess of the contributions made by the owners of such trucks to the cost of construction and maintenance of said roads—that said heavy trucks greatly increase the hazard of driving other vehicles on the roads of Pennsylvania and of other states, and that the plaintiffs and other operators of heavy trucks regularly and deliberately violate the weight and speed limitations imposed by the laws of the Commonwealth of Pennsylvania and of other states, thereby further increasing both the hazards on the roads and the physical damage thereto.

37. This defendant further avers that the plaintiffs and other users of large trucks, although operating only about 5% of the nation's freight-carrying motor vehicles and 1% of the total motor vehicles using the public streets and highways, have by untrue and misleading statements, advertising pamphlets, pictures and otherwise, sought to give the impression that they speak for all of the highway users including the operators of 8,700,000 small and medium-size trucks and over 44,000,000 passenger cars, and that by these means they have attempted to keep from the public and the legislatures information of the great and costly damage to the highways that they, a small fraction of the highway users, have caused and are causing.

38. This defendant further avers that it not only does not seek and never has sought to maintain a monopoly of transportation or to destroy transportation by truck, whether competitive or otherwise, but that it has fostered and encouraged, and continues to foster and encourage, honest, lawful, legitimate and fair operation of trucks, whether in competition with this defendant or otherwise, but at rates which fairly represent the cost of the service rendered and not at rates made artificially low by an indirect subsidy which transfers a considerable part of the costs of private transportation to the general public. The [fol. 20] railroads own or operate many thousands of trucks, and this defendant, the largest truck operator in Pennsylvania and the sixth largest truck operator in the nation, alone owns or operates in excess of 5,000 trucks which are used to supplement the movement of freight by railroad,

and therefore has a vital interest in the well-being of the trucking industry and in the maintenance of the nation's highway system.

39. This defendant further avers that to the extent that the plaintiff and others violate the laws of the states in which they operate they compete unfairly and illegally with this defendant. In the Commonwealth of Pennsylvania alone in the year 1952, there were 28,000 arrests of truck operators because of violations of weight limitations by overloading. This defendant has sought and will continue to seek to prevent such unfair competition with it by every legal and proper method available to it.

40. This defendant further avers that the plaintiffs and others operating large vehicles, particularly those carrying axle loads in excess of 18,000 pounds, fail to pay their proportionate share of the damage that such loads cause the highways over which they move, and that to that extent they are unfairly subsidized by the general public and by the other taxpayers whose tax payments, devoted to the construction, repair and maintenance of roads, are proportionately greater than they would be if those whose vehicles carry such excess loads were required to pay their fair share of highway costs.

41. This defendant further avers that as a payer of large amounts of taxes to the federal, state and local governments, it is adversely affected by the plaintiffs' and other big truckers' failure to pay their fair share of the cost of building and maintaining the public highways which they use in their private businesses; and that this defendant had and has a legal as well as a moral right to inform the public and the members of the legislatures of the in- [fol. 21] sufficiency of highway user taxes paid by the plaintiffs and other users of large trucks.

42. This defendant further avers that whatever acts affecting the plaintiffs have been done by defendant, those acts were lawful in themselves and lawfully done in furtherance of this defendant's constitutional rights to inform the public and the legislatures of the several states

of the truth with regard to the enormous damage done to the roads by the operators of heavy and especially of overweight trucks, with regard to their repeated and deliberate violations of the laws limiting the weight and speed of big trucks, with regard to their failure to pay their fair share of the cost of constructing, maintaining and repairing the roads, and with regard to the driving hazards they create—facts which the plaintiffs have actively sought to distort and suppress.

43. This defendant further avers that, in bringing to the attention of the members of the legislatures and of the public the illegal operations of the plaintiffs and others using large trucks, and the destruction of the American highway system by such use, and the failure of the users of large trucks to pay their fair share of the costs of building and maintaining the highways; this defendant was joining the protests of a great cross-section of the American public,—private motorists, highway engineers, taxing authorities, state legislators, governors, and farm and business groups.

Sixth Defense.

44. This defendant avers that plaintiffs are precluded from obtaining injunctive relief or damages by their own illegal conduct, as follows:

a. Plaintiffs, acting in concert through the agency of the plaintiff Pennsylvania Motor Truck Association, have over a period of years engaged in the dissemination of untrue and disparaging statements concerning [fol. 22] this defendant, which statements were published and circulated by the plaintiffs with the purpose of injuring this defendant in its business and in its relations with its customers. Such untrue and disparaging statements were circulated by the plaintiffs to the public in general, to public officials and to suppliers and customers of the defendant.

b. This suit was instituted by the plaintiffs with the purpose of injuring this defendant as a competitor in the interstate freight transportation business by the

repetition, under the cloak of the privilege of these proceedings, of untrue statements concerning this defendant and its business.

c. This suit is a further attempt by the plaintiffs and other users of heavy trucks to divert attention from mounting public opinion against the destruction of the highways caused by large tractor-trailer combinations and other heavy trucks, so as to enable the plaintiffs to continue to avoid the payment of proper and sufficient charges for their use of the highways, and thereby retain their ability to compete with this defendant on an unfair and discriminatory basis.

Philip Price, for Barnes, Dechert, Price, Myers & Rhoads, Attorneys for Defendant, The Pennsylvania Railroad Company.

[Similar answers were filed by the other defendants.]

[fol. 23] EXHIBIT A TO ANSWER

VETO No. 48.

January 21, 1952.

I file herewith, in the Office of the Secretary of the Commonwealth, with my objections, Senate Bill No. 615, Printer's No. 511, entitled 'An Act to further amend the act approved the first day of May one thousand nine hundred twenty-nine (P. L. 905) entitled 'An act for the protection of the public safety regulating the use of highways and the operation of vehicles tractors street cars trackless trolley omnibuses bicycles pedestrians and the riding of animals upon the highways of this Commonwealth providing for the titling including liens encumbrances and legal claims registration of certain vehicles and licensing the operators thereof upon payment of prescribed fees prescribing and limiting the powers of local authorities to deal with the subject matter of this act conferring powers and imposing duties upon the Depart-

ment of Revenue the Department of Highways peace officers majors burgesses magistrates aldermen justices of the peace the courts and the clerks thereof owners of vehicles and garage keepers providing that records are admissible as evidence imposing upon owners counties cities boroughs incorporated towns townships within the Commonwealth liability for damages caused by the negligent operation of their motor vehicles imposing penalties imposing certain costs upon counties providing for the disposition of fines forfeitures fees and miscellaneous receipts making an appropriation and providing for refunds by increasing annual registration fees for certain commercial motor vehicles truck tractors trailers and semitrailers prescribing additional equipment requirements for certain vehicles increasing the maximum gross weights and [fol. 24] axle loads allowed for certain vehicles changing the requirements for weighing vehicles and removal of excess loads and prescribing and changing penalties PROVIDING THAT CERTAIN PENALTIES SHALL BE ENFORCED BY LIENS UPON VEHICLES AND THE SALE OF SUCH VEHICLES FREE OF ALL LIENS AND ENCUMBRANCES AND IMPOSING DUTIES UPON OPERATORS OWNERS MAGISTRATES AND SHERIFFS."

This bill would amend the Vehicle Code, Act of May 1, 1929, P. L. 905, by, among other things, increasing the permissible gross loads of various classes of commercial vehicles and combinations of motor vehicles and trailers and truck tractors and semitractors as well as the permissible tandem axle loads (1).

Being mindful of the observations of Mr. Chief Justice Gibson, over a century ago, that, in Pennsylvania a highway "is the property of the people, not a particular district, but of the whole State" (Philadelphia and Trenton Railroad Co., 6 Wharton 25, 43 (1840), I was motivated by the strong and determined opposition to this bill to call a public hearing to enable the opponents and propo-

(1) Theoretically tandem axle loads are not increased by this bill. Actually, however, under the presently existing permissible gross, it would be impossible, if the load were properly distributed to obtain a load of 36,000 pounds on a tandem axle of a semitrailer.

nents thereof to present their respective views before making a final decision either to approve or disapprove it.

The hearing was held in the executive office at the State Capitol on Thursday, January 17, 1952. A myriad of views were presented by representatives of various civic, municipal, labor, industrial, and railway organizations and trucking industry of Pennsylvania itself.

I am fully mindful that the trucking industry plays a significant and important role in the economic and community affairs not only of this Commonwealth, but also the entire nation. I am not convinced that it pays its just [fol. 25] share of the maintenance of our public highway system. I am also mindful of the possible destructive effects which, as demonstrated by the tentative findings of the Highway Research Board of the National Academy of Sciences, based on actual tests during the last year and a half on a section of highway built by the State of Maryland in 1941, may result from the increase of permissible gross and axle loads. I should point out, however, that all of the information available to me was *not* available to the Legislature when this bill was being considered by it. Ordinarily, in such a matter as this, I would feel constrained to accept the legislative views, but, after careful and thorough consideration, especially in view of the critical shortage of materiel which are used in highway construction projects, I am convinced that the wisdom of subjecting our highway system—a $1,700,000,000 investment—to additional burdens should be carefully considered by the Legislature in the light of the final findings and recommendations of the Highway Research Board which, unfortunately, will be published too late for me to consider them. If the Legislature, in the light of the final report and recommendations of the Highway Research Board, as well as other matters which I mentioned herein, again adopts the basic policy of this bill, I would hardly have any choice in the matter for the Supreme Court has said that "It is for the Commonwealth acting through the Legislature, to direct the conditions under which * * * (the) right to use the highway) shall be exercised." Commonwealth v. Funk, 323 Pa. 390, 394, 395 (1896).

Deferring the policy of this bill will not, in the meantime, severely handicap the trucking industry of this Commonwealth during the period of time required for further Legislative consideration—a year. The tandem axle weights allowed by this bill, I am informed, will be lawful only in a very few states.

This bill contains some inconsistencies. For instance, I am informed that the permissible gross of classes Y, Z and [fol. 26] ZZ can only be attained by exceeding the permissible axle load which, of course, is not a desirable situation.

(2)

Furthermore, the $25.00 fine provided by this bill for violation of the permissible axle load—in my opinion, a very serious matter—is woefully inadequate as an effective deterrent.

Last, but not least, legislation of this nature should contain specific limitations predicated on all of the factors generally regarded by public highway authorities as related to the preservation of our *entire* highway system, including not only primary but also secondary and rural facilities. In short, it should be made just as unprofitable for a vehicle or combination to violate load restrictions on posted highways and bridge facilities imposed by the Secretary of Highways and local authorities, pursuant to law, as to violate the permissible gross load which this bill would establish. This bill is entirely inadequate in that respect.

For these reasons, the bill is not approved.

(2) This very bill would impose a fine of $100 plus $2 for each 100 pounds or fraction thereof for violation of the permissible gross by a combination of truck tractor and tandem axle semitrailer.

[fol. 35]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW HOLDING DEFENDANTS LIABLE FOR VIOLATING THE ANTITRUST LAWS—Filed October 8, 1957

A.

Findings of Fact.

1. Plaintiffs other than plaintiff Pennsylvania Motor Truck Association (hereinafter referred to as PMTA) are trucking companies engaged in the long distance hauling of freight in interstate commerce (Brief p. 3).*

2. Plaintiff PMTA is a Pennsylvania corporation, whose membership includes most of the other plaintiffs and other trucking firms (Brief p. 3).

3. Defendant railroads are also engaged in the long distance hauling of freight in interstate commerce (Brief p. 3).

4. The individual defendants Clement, Franklin, Graham, Okie, Brown and Fisher were, during the period in suit, May 19, 1949 to date, presidents of various defendant railroads and were members of the defendant Eastern Railroad Presidents Conference (hereinafter referred to as ERPC) (Ex. P. 264).

5. Defendant ERPC is an unincorporated association whose membership consists of the presidents or trustees of the eastern railroads, including all of the defendant railroads, the eastern territory being defined as that north of the Potomac and east of the Ohio rivers. ERPC's activities are financed by assessments paid by the eastern railroads, including all of the defendant railroads (Brief pp. 3, 65).

[fol. 36] 6. Defendant Carl Byoir & Associates, Inc. (hereinafter referred to as Byoir), is a corporation engaged in

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* References are to plaintiffs' brief filed in support of these requests.

the business of public relations, that is the influencing of public opinion on behalf of its clients, in this case ERPC (Brief p. 3).

7. The acts of the various defendants referred to in these Findings of Fact and Conclusions of Law and of those persons employed or engaged by them, were done and performed pursuant to the conspiracy and with the intent and for the purposes and objectives referred to below in Findings of Fact Nos. 12 and 14, and in the case of agents or employees, pursuant to their authority from their respective principals within the scope of their employment or agency. In the case of ERPC, the persons referred to herein as so acting include its members, the Competitive Transportation Committee, its Legal, Research and Public Relations Sub-Committees, and their respective members, and the officers of ERPC. In the case of defendant railroads, such persons include their respective presidents or trustees and their respective other officers, employees or agents (Brief pp. 65-67).

8. Defendant railroads include the major railroads in the eastern territory, such as the Pennsylvania, New York Central, Chesapeake & Ohio, Baltimore & Ohio and the New York, New Haven & Hartford, referred to by defendant Byoir as the "Giants of the Industry" (Brief p. 3).

9. Defendant railroads operate in interstate commerce in 17 states approximately 50,000 miles of track, have assets totaling approximately $15,000,000,000, and annual operating revenues in excess of $4,000,000,000 (Brief p. 3, and Ex. P. 270).

10. Defendant Byoir, during the period in suit, represented twenty-two of the country's major enterprises, and [fol. 37] was a major and powerful agency in creating public opinion and influencing government action on behalf of its clients, including ERPC (Brief p. 3).

11. Plaintiff trucking companies and defendant railroads are competitors in the long distance hauling of freight in interstate commerce (Brief p. 3).

12. On or about May 19, 1949, defendants other than Byoir, acting through ERPC, combined and conspired with

the intent and for the purpose and objective of eliminating truck operators, including plaintiff trucking companies, from the long-haul transportation of freight in interstate commerce in the eastern territory and monopolizing that portion of interstate transportation and commerce for defendant railroads (Brief pp. 6, 7-11, 47).

13. On or about May 19, 1949, ERPC appointed a Competitive Transportation Committee with Legal, Research and Public Relations Sub-Committees to carry out the intent, purpose and objective of the said conspiracy (Brief pp. 6, 7-11).

14. Defendant Byoir joined the said combination and conspiracy with the intent and for the purpose and objective referred to in Finding of Fact No. 12, on or about August 15, 1949, when it was retained by ERPC as its public relations agency (Brief p. 7).

15. In the period August 15, 1949 to December 31, 1953, most of ERPC's funds were spent through Byoir, the actual amounts spent through Byoir by the Competitive Transportation Committee being as follows: August 15 to December 31, 1949 $74,252.12; 1950 $311,136.51, 1951 $320,845.04; 1952 $285,203.88; 1953 $311,620.16. In addition ERPC spent the following amounts through Byoir for what it termed a general public relations program: 1952 [fol. 38] $443,681.15; 1955 $495,214.43, the total spent through Byoir thus amounting to $2,241,953.29 (N. T. 1514-15).

16. The principal means used by defendants to carry out their conspiracy was the third person technique for creating public opinion and thereby procuring legislation (a) imposing or retaining weight restrictions on trucks; and (b) subjecting trucks to ton mile, weight distance or similar taxes, in order to increase their costs of operation and to cause them to lose business (Brief pp. 11-12).

17. The railroads had previously employed the same methods for the purpose of restraining truck competition during the 1930's (illustrated by the activities referred to in the report of the Wheeler Committee of the United States Senate) and after World War II (illustrated by the

advertisements prepared and paid for by The Pennsylvania Railroad, but published in the name of the Pennsylvania Association of Township Supervisors, a public statutory association (Brief pp. 4-5, 5-6).

18. Byoir also had previously employed such methods (illustrated by the activities referred to by the United States Courts in the A & P decisions, in which Byoir was found guilty of violating the anti-trust laws (Brief p. 11).

19. The third person technique consists of forming, reactivating or otherwise using other organizations or individuals who appear not to have any connection with the railroads or any interest in the railroad objectives, as sources of attribution for and to disseminate in their own names propaganda attacking trucks, while the railroads conceal their role in the preparation and instigation of and the payment for such propaganda, and their purpose in having it thus disseminated (Brief pp. 11-12).

20. The third person technique was adopted by defendants so that the public, including government officials, [fol. 39] would not be able properly to evaluate their propaganda thus disseminated and in order to achieve for it wider distribution and more favorable reception (Brief p. 12).

21. Byoir formed the Empire State Transport League in New York and the New Jersey Citizens Tax Study Foundation in New Jersey in order to carry out its third-party program (Brief pp. 12-13).

22. For the same purpose, Byoir reactivated the New Jersey Automobile Owners, Inc., which had been dormant for many years (Brief p. 13).

23. For the same purpose, Byoir also used existing organizations such as the Citizens Tax League of Rochester, New York, the Citizens Public Expenditure Survey of New York, the Save Our Highways Clubs of Tennessee and Ohio, the Pennsylvania State Grange and the Pennsylvania Association of Township Supervisors (Brief pp. 13-16).

24. For the same purpose, defendants used the Farm Roads Foundation of Washington, D. C. (Brief p. 49).

25. Propaganda material attacking trucks and encouraging enactment or retention of weight restrictions and ton-mile, weight distance or similar taxes was disseminated by defendants in the names of the organizations referred to in Findings of Fact 21 to 24 above. The propaganda was prepared by Byoir and paid for by ERPC and in turn, by defendant railroads. The connection of the railroads with this propaganda was concealed and defendants made it appear that the organizations ostensibly disseminating the propaganda were doing so for civic motives not connected with the objectives of the railroads (Brief pp. 12-16).

26. For the same purpose and in the same manner defendants procured the services of Mrs. Bessie Q. Mott, who [fol. 40] was on a regular monthly retainer from Byoir, to circulate in her own name, accompanied by the title "Chairman, Public Affairs Department, New York State Federation of Women's Clubs", the same type of anti-truck propaganda (Brief pp. 19-20).

27. Defendants also caused ostensibly independent surveys and reports to be published repeating their anti-truck propaganda line, which defendants financed, concealing their connection therewith. Among such reports or surveys were the Griffenhagen study in New York, published in the name of the Citizens Public Expenditure Survey; the Princeton Reserch Service polls, of which the results were published by the Citizens Public Expenditure Survey and the New Jersey Citizens Highway Committee; and the Fact Finders Survey, published in the name of Fact Finders Associates (Brief pp. 17-19).

28. Defendants also caused to be published in national magazines and other publications, articles by ostensibly independent authors, again repeating the anti-truck propaganda line of defendants. Byoir prepared or participated substantially in the preparation of such articles and in their distribution. The connection of the railroads with such articles was concealed. These articles included: "The Rape of Our Roads", Frederick G. Brownell—Readers' Digest, July 1950; "Our Roads Are Going to Pot", Myron Stearns—Harper's, September 1950; "History, Trucks & Money", Hardy Burt—The National Grange Monthly, April

1952 and "Who Should Pay For Our Roads", Richard Neuberger—Harper's, October 1952 (Brief pp. 19-21).

29. Byoir also paid for the preparation and distribution of syndicated mats, including pictures, repeating the anti-truck propaganda of defendants. Such distribution was made in the name of ostensibly independent syndicates, concealing the connection of defendants with such distribution (Brief p. 26).

[fol. 41] 30. Byoir caused defendants' anti-truck propaganda to be distributed by public officials, such as Clinton Johnson, referred to below in Finding number 34, and through Theodore Kauer and Harold Cohen of the Ohio Department of Highways, in the name of the Bureau of Public Roads of the State of Ohio, concealing the fact that such propaganda had been prepared by Byoir and the connection of defendants therewith (Brief pp. 21-22).

31. As part of their campaign defendants vilified long-haul truckers as five percenters, which connoted "fixers", and characterized truck operators as evil, sinister wrongdoers and villains (Brief p. 26).

32. Defendants also harassed long-haul truckers by having the anti-truck propaganda referred to above disseminated by their front organizations and individuals to public officials such as the New York sheriffs, the Pennsylvania State Highway Department and the Commission on State Tax Policy of New Jersey (Brief pp. 13, 18, 27).

33. Defendants caused such propaganda to be used and cited as reference sources by their front organizations and individuals and other persons. For example, Byoir had one of its ghostwriters prepare an article "History, Trucks & Money" which was published in the National Grange Monthly under the by-line of Hardy Burt. Reprints of the article were sent out in the names of organizations such as the Grange and Save Our Highways Club. A copy of the article was then sent by a vice-president of the Pennsylvania Railroad to Dr. Milton Eisenhower, at Penn State College, with a covering letter which gave the impression that the railroads had no connection at all with the article. The same technique was used with a film produced in the

name of the Farm Roads Foundation which was based on an article in the Country Gentleman written by a Byoir ghostwriter, by-lined in the name of an ostensibly indepen- [fol. 42] dent author. The film itself did not disclose the railroads as its source and did not disclose the fact that the railroads paid for its production and distribution, which they did. Also, such articles as the "Rape of Our Roads" and "Who Should Pay For Our Roads" were used as reference sources for other articles and were used to influence even persons and organizations already fronting for defendants, who were not aware of defendants' connection with such articles, as in the case of Dr. Dimit (Brief pp. 19-20, 49).

34. Byoir also worked behind the scenes with legislators, legislative committees and other public officials to influence their reports and other official actions without revealing the connection of the railroads. For example, Byoir worked behind the scenes with (a) the Manning Committee of the New York State Senate, in order to achieve passage of the ton-mile tax in New York; (b) with Dr. Sly, Chairman of the Commission on State Tax Policy in New Jersey, to influence its Fifth Report, which defendants thereafter used as their "Bible" in New Jersey and elsewhere; (c) with Van Riper, the Pennsylvania Highway Planning Engineer, in preparing reports for the Secretary of Highways and ultimately the Governor; (d) Clinton Johnson, Public Relations Director of the Maryland State Roads Commission, in publicizing the Maryland Road Test and furnishing material to magazines and newspapers with regard to the test and other matters (Brief pp. 18, 21-23).

35. Part of the propaganda thus disseminated consisted of distorted accounts with regard to the Maryland Road Test. This test measured the effect of various axle loads, as distinguished from gross weights, on a highway in Maryland having subsoils of various kinds. Its primary conclusion was that even axle loads of 22,400 pounds and more caused no cracks in that portion of the highway constructed on a good granular subsoil, whereas they did cause cracking in that portion of the highway constructed on clay [fol. 43] or silt subsoils. The test also indicated that no

damage was done on those portions of the highway which were sealed so as to prevent pumping, as in the turn-around sections (Brief p. 25).

36. The distorted accounts which defendants caused to be disseminated gave the erroneous impression that the Maryland Road Test was a study of the effect of gross weights, rather than axle loads; that it therefore was material in the consideration of Senate Bill 615 in Pennsylvania, which did not increase axle limits; that the test was a "Crackathon"; that long-haul trucks destroyed highways regardless of the type of sub-soil or surface construction; that the test proved that there should be no increase in truck weights; that truck weights should be restricted, and that trucks should be required to pay ton-mile or weight distance taxes because of the destruction they caused to highways (Brief pp. 23-26).

37. As part of their misuse of the Maryland Road Test, Byoir caused to be prepared and distributed an edited version of the official Maryland Road Test film from which was omitted a substantial portion in which the relationship between sub-surface construction and cracking was carefully explained, as well as part of the conclusion which the Deputy Commissioner of Public Roads believed defendants were including in the edited version. The omitted portion of the conclusion again stated clearly the importance of the relationship between proper sub-surface construction and cracking highways (Brief pp. 24-26).

38. Byoir also distributed and caused to be publicized just prior to Governor Fine's veto of SB 615, a tentative draft of a final report of the Maryland Road Test findings, in violation of the direction of the Highway Research Board withholding it from distribution because of its in-[fol. 44] accuracy. In the course of such distribution, Byoir also inaccurately summarized even the tentative conclusions and caused them to be published in Newsweek and elsewhere (Brief pp. 24, 34-35).

39. Defendants began their campaign in New York and New Jersey as a pilot operation, where they tested it, so that they could transplant it to other states, including

Pennsylvania, which they did. Their operations in each state were intended to affect the other states in the eastern territory (Brief p. 27).

40. Defendants succeeded in procuring a ton-mile or weight distance tax in the State of New York as one of the means or steps in carrying out their conspiracy and made efforts to obtain similar legislation for the same purpose in the States of New Jersey, Ohio, Pennsylvania and Indiana, and are still seeking such a tax in Pennsylvania. Ton-mile, weight distance or similar taxes are taxes levied only upon trucks and cargoes over certain weights, based upon the weight and the distance traveled (Brief pp. 27-30).

41. Defendants succeeded in procuring weight restrictions in the State of New Jersey and in retaining weight restrictions in the State of Pennsylvania. Weight restrictions are basically of two different types: (a) laws forbidding trucks to carry gross weights above a certain amount; and (b) laws forbidding trucks to load weights above a certain amount on particular axles (Brief pp. 28, 57).

42. In Pennsylvania defendants opposed any increase in truck weights despite the fact that the Pennsylvania 45,000 pound gross weight limitation created an interstate trade barrier, being 15,000 pounds less than every surrounding state except West Virginia, where the limit was 58,400 pounds (Brief pp. 30, 31).

[fol. 45] 43. Senate Bill 615 of the 1951 session of the Pennsylvania General Assembly (SB-615) would have increased gross loads for tandem axle semi-trailers without increasing axle loads. The axle load limits would actually have been reduced on the tandem axle (Brief p. 38).

44. In opposing SB-615, defendants followed the third person technique described above (Brief pp. 13-17, 31-33).

45. C. Colburn Hardy, the Byoir employee who was in charge of defendants' campaign against SB-615, set up headquarters in the office of the Pennsylvania State Grange, used Grange letterheads, was billed in the name of the Grange, prepared, paid for and disseminated railroad propaganda opposing SB-615 in the name of the Grange,

and instructed his staff to represent themselves as Grange agents (Brief pp. 13-17, 32-33).

46. Hardy and his staff also prepared, paid for and disseminated defendants' propaganda in the name of the Pennsylvania Association of Township Supervisors and other groups opposing SB-615 (Brief pp. 13-17, 32-33).

47. Defendants' campaign in the name of the Pennsylvania Association of Township Supervisors violated the statute defining the powers of that organization (53 Purd. Stat. Sec. 19093-610 to 614).

48. Defendants' immediate objective in their campaign against SB-615 was to defeat the bill (Brief pp. 31-32).

49. When defendants' campaign to prevent passage of SB-615 by the Pennsylvania General Assembly failed, they concentrated on obtaining its veto by Governor Fine, stimulating a flood of protests to the Governor, encouraging anti-truck editorials, planting anti-truck articles and intensifying their anti-truck campaign in the name of the Grange and the Township Supervisors (Brief pp. 32-34).

[fol. 46] 50. As a result of this strong and determined opposition to the bill created by defendants, the Governor called a public hearing (Brief p. 37).

51. Hardy undertook to collect witnesses in opposition to the bill (Brief p. 35).

52. Just prior to the hearing, Hardy sent William A. Reiter, Chairman of the Associated Railroads of Pennsylvania, a statement by Kauer on the Maryland Road Test, to use against the bill, despite the fact that it was irrelevant, and also through Clinton Johnson and others, managed to publicize in a distorted manner the Maryland Road Test tentative draft report in time for the hearing, although the report was officially withheld from publication and was irrelevant (Brief pp. 24, 33-35).

53. Defendants' activities created a strong and determined opposition to SB-615 and the incorrect belief that the Maryland Road Test was relevant in its consideration and had shown that a gross weight of 60,000 pounds would

materially damage Pennsylvania's highway system (Brief pp. 36-39).

54. Defendants' activities were a substantial cause of the veto of SB-615 by Governor Fine (Brief pp. 36-39).

55. As a result of the veto of SB-615, plaintiff trucking companies were injured (Brief pp. 39-40).

56. Plaintiff PMTA was injured by reason of the substantial expenditures which it made to defend itself and its members against defendants' conspiracy (Brief p. 40).

57. Defendants' opposition to SB-615 was unreasonable in that:

[fol. 47] (a) Defendants determined in advance to oppose remedial legislation, regardless of its nature;

(b) It perpetuated the Pennsylvania trade barrier which had a serious adverse effect on plaintiffs and on Pennsylvania industry and agriculture, putting them at a competitive disadvantage as against other states;

(c) Defendants themselves had agreed that a 60,000 pound gross weight was reasonable elsewhere, as in Illinois;

(d) Gross weight increases, unaccompanied by axle load increases, are not objectionable;

(e) The railroads did not have enough freight cars to handle all of the traffic they were offered, but nevertheless they deprived long-haul truckers, including plaintiffs, of traffic, aggravating the shortage to the injury of plaintiffs and the public;

(f) Defendants intended thereby to injure long-haul truckers, including plaintiffs (Brief pp. 48-50).

58. In 1953 in Pennsylvania, defendants' campaign against HB-1390, the counterpart of SB-615, was substantially the same as their campaign against SB-615 (Brief p. 59).

59. Defendants' means of achieving their objective against plaintiffs constituted unfair competition, being based on deception of the public, manufacture of bogus sources of reference, distortion of public sources of infor-

mation, vilification and harassment, and procuring governmental restraints (Brief pp. 50-52).

60. None of plaintiffs' activities either motivated or justified defendants' conspiracy (Brief p. 63).

[fol. 48] B.

Conclusions of Law.

1. In or about May 1949, defendants, other than defendant Carl Byoir & Associates, Inc., combined and conspired in restraint of interstate trade and commerce, for the purpose of monopolizing long-haul transportation of freight, among the northeastern states of the United States, seeking to eliminate plaintiff trucking companies and others as competitors in that field of interstate commerce.

2. Defendant Carl Byoir & Associates, Inc. joined and became part of that combination and conspiracy in or about August 15, 1949.

3. Defendants' combination and conspiracy violated Section 1 and Section 2 of the Sherman Act (15 USCA Sections 1 and 2).

4. The means adopted by defendants for achieving their unlawful objective constituted unfair competition against plaintiffs.

5. Defendants' unlawful combination and conspiracy in restraint of trade injured plaintiff trucking companies.

6. Plaintiff PMTA was thereby injured (a) by the damage to its reputation caused by defendants' campaign of harassment and vilification, (b) by being required to defend itself and its members against defendants' unlawful combination and conspiracy.

7. Defendants' combination and conspiracy were *per se* a violation of the Sherman Act.

8. Defendants' combination and conspiracy were unreasonable and resulted in an unreasonable restraint of trade in violation of the Sherman Act.

[fol. 49] 9. Plaintiffs' conduct neither motivated nor justified defendants' unlawful combination and conspiracy.

10. The fact that the means used by defendants to achieve their objective included procuring or maintaining legislative restrictions on plaintiff truckers does not excuse them from liability under the Sherman Act.

11. Defendants' combination and conspiracy were not privileged under the Constitution.

12. That other groups and individuals may have sought some of the same intermediate objectives as defendants, does not excuse defendants from liability for violation of the Sherman Act.

13. Each and every one of the defendants against whom this action has not previously been dismissed for lack of personal jurisdiction or proper service is liable for defendants' unlawful combination and conspiracy.

14. Defendants' activities were a substantial cause of the veto of SB-615 by Governor Fine.

15. Defendants are estopped to deny that their activities caused the veto of SB-615.

16. Plaintiffs are entitled to damages for the injuries which they have sustained as a result of defendants' unlawful combination and conspiracy.

17. Plaintiffs are entitled to recover the costs of suit, including reasonable attorneys' fees.

18. Plaintiffs are entitled to injunctive relief against defendants' unlawful combination and conspiracy.

Respectfully submitted,

Harold E. Kohn, Aaron M. Fine, Philip P. Kalodner, Dilworth, Paxson, Kalish & Green, By Harold E. Kohn, Attorneys for Plaintiffs.

[fol. 50]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPINION—October 10, 1957

Clary, J.

The present action involves a suit for an injunction and treble damages under the Sherman and Clayton Antitrust Acts, Sections 1 and 2 of the Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. A. §1, et seq., and Section 15 of the Act of October 15, 1914, 38 Stat. 731, 15 U. S. C. A. §15, by 41 interstate long-haul truckers and the Pennsylvania Motor Truck Association, hereinafter called "PMTA", against some 35 railroads operating in the northeastern part of the United States; the Eastern Railroad Presidents Conference, hereinafter referred to as the "Conference" or "ERPC", and Carl Byoir & Associates, Inc., a New York public relations firm, hereinafter called "Byoir". Opinions dealing with preliminary motions to dismiss, discovery matters, and a motion to file an amended answer and counterclaim are reported at 113 F. Supp. 737 (E. D. Pa. 1953); 14 F. R. D. 189 (E. D. Pa. 1953), and 19 F. R. D. 146 (E. D. Pa. 1956).

The basic allegation in both the claim and the counterclaim is that the defendants on the one hand conspired to obtain a monopoly of and to drive the plaintiffs out of the business of long-haul freight transportation in the northeastern section of the United States by various and sundry means, which will be more fully discussed later in this opinion, and on the other hand the defendants claim that the plaintiffs themselves were engaged in an illegal conspiracy for the identical purpose to obtain a monopoly of the long-haul freight industry in the same part of the United States and to force the railroads out of that segment of the transportation business in the area.

The Parties.

The individual plaintiffs in this case are each engaged in the trucking business, as stated above, and operate regu-

[fol. 51] larly through Pennsylvania in intercity and interstate long distance hauling. Nearly all of the plaintiffs are members of the plaintiff, Pennsylvania Motor Truck Association, which is a corporation chartered on April 24, 1928, in the Court of Common Pleas No. 4 of Philadelphia County, having its principal office at the 7th Floor, Telegraph Building, Harrisburg, Pennsylvania. PMTA has chapters in every county of Pennsylvania and its members are primarily operators of motor trucks who operate in or through Pennsylvania, including industries which operate their own trucks as well as those operating trucks for hire.

The first defendant, Eastern Railroad Presidents Conference ("Conference"), is an unincorporated association maintaining offices at 230 Park Avenue, New York 17, New York, and 143 Liberty Street, New York, New York. The membership of the Conference includes the presidents or trustees of approximately 35 railroads in 17 eastern states of the United States, operating north of the Potomac and east of the Ohio rivers. The presidents and trustees officially represent their respective railroads in the Conference, which is supported, maintained and utilized by said railroads. The Conference maintains a permanent functioning organization and a staff of paid personnel. It has regular meetings of its members and a paid executive director, presently one David I. Mackie. The Conference operates through a number of committees and subcommittees, including a subcommittee on public relations, described in detail later in the opinion, and also maintains a Bureau of Information at Grand Central Terminal, New York 17, New York. The respective railroads are regularly assessed for the cost of operating the Conference, assessments being prorated based on the size and income of the respective roads so that the Conference is in large measure supported by the big railroads, the end result being that the larger railroads contribute proportionately a much larger share for the Conference than do the smaller railroads.

[fol. 52] The individual defendants who were originally sued were the presidents or past presidents of the several railroads, members of the Conference at some of the times covered by the complained of actions, or were key members of the Public Relations Subcommittee of the Conference.

The defendant railroads are all Class 1 railroads, most of which operate in Pennsylvania, and all are active members of the Conference.

The defendant Carl Byoir & Associates, Inc. is a New York corporation, engaged in the public relations business, with its principal office at 10 East 40th Street, New York City, New York.

The Contentions.

Plaintiffs in their complaint, after identifying the parties, summarize the respective relations of each defendant in the transportation of passengers and freight in the northeastern section of the United States. The complaint then alleges that in May of 1949 the defendants embarked upon an illegal conspiracy in violation of the antitrust laws of the United States, the purpose and objective of the conspiracy being to eliminate the plaintiffs as well as others in the same industry as competitors to the railroads in the field of long-hauling of freight, and to carve out exclusive railroad monopolistic spheres of operation in the said industry to the end that the railroads would have a monopoly on freight hauling in interstate commerce. The complaint charges that ERPC appointed a Committee on Competitive Transportation (ER-TC), charged with carrying out the details of the conspiracy, and that that committee retained defendant Byoir as its public relations agent for the express purpose of effectuating the object of the conspiracy. Further, that Byoir in conjunction with the ERPC and the railroads, acting through their presidents and/or trustee, or subcommittee of the Committee on Competitive Transportation, embarked upon a campaign designed specifically [fol. 53] to impede the operation of the trucker-plaintiffs in every possible way, and in pursuance thereof, among other things, vilified and defamed the plaintiffs by circulating to the public generally, to public officials, and to suppliers and customers of the plaintiffs, false and malicious reports of and concerning the plaintiffs in the conduct of their business of hauling freight; formed so-called "independent" citizens groups organized to circulate false and malicious propaganda attacking the plaintiffs, which propaganda was in fact the product of Byoir and its employees issued on

behalf of the railroads but made to appear to emanate from independent sources; sought to secure the passage of legislation favorable to the railroads and injurious to the truckers through the instrumentalities of the so-called "independent organizations"; attempted to and actually prevented the passage of legislation in Pennsylvania favorable to the truckers (S. B. 615) by using and duping as well as bribing public officials and officials of independent organizations; all to the end that the defendants might bring about the destruction of the plaintiffs' business and the elimination of them as competitors. The complaint charged that the conspiracy continued from 1949 to the date of the institution of the suit on January 17, 1953; has resulted in disparaging the plaintiffs' business in the public mind; has created great public hostility to the plaintiffs; has interfered with the legitimate conduct of their business and the furtherance of their business, resulting in increased cost to shippers and consumers, particularly in areas not served by the railroads; has increased the expense of operation by the plaintiffs, and finally has caused loss of accounts and profits and prospective profits to the plaintiffs.

The defendants originally answered the complaint but did not counterclaim. In their original answers the defendants denied the existence of any conspiracy, alleged that the plaintiffs in competition with the railroads were enjoying enormous public subsidies in the matter of the free use of public highways; that they were unfairly competing [fol. 54] with the railroads by carrying loads substantially in excess of the legal weights permitted by the several states; that mere fines for overloading were not sufficiently high to stop the overloading; that the overloaded trucks destroyed the highways; that any effort made on behalf of the railroads to "improve their competitive position in the climate of competition in the field of long-hauling of freight" was ultimately directed to the attainment of legislative measures which involve the right of free speech and right to petition the legislature, both constitutional guarantees and therefore without the orbit of the antitrust laws; and finally that everything done by the railroads was within the "rule of reason" in free competitive enterprise. The railroads also contended that as taxpaying citizens they had the

right to point up a growing public abuse in that heavy trucks ruined highways, requiring a greater and greater expenditure of public funds, and that roads and bridges, underpasses and overpasses had to be reconstructed to provide facilities for the increasing volume of traffic and size of vehicles, all of which was to the detriment of the railroads which had to pay part of the reconstruction costs of such facilities.

Early in 1956, after the case had been assigned an October 1, 1956 trial date and during the pendency of discovery procedures, some of the railroads and ERPC sought permission to and were allowed to counterclaim against the truckers. The counterclaim charged that the truckers themselves were engaged in nefarious practices against the railroads and with the sole purpose and objective of themselves obtaining a monopoly of and driving the railroads out of the long-haul transportation business in the northeastern section of the United States. It averred that the truckers had engaged in identical public relations programs about which the truckers in their complaint had complained of the railroads; that they made use of the same "third party techniques" charged against the railroads; that they used bogus organizations to advance their cause as against the rail-
[fol. 55] roads, and, finally, that they in concert sought to so injure the railroads as to eliminate them as competitors in the long-haul transportation field. On these contentions the case went to trial solely as to the issue of liability. Each side has now concluded its testimony with respect to the question as to whether there was a conspiracy on the part of either, or both, to monopolize long-haul freight transportation in the northeastern part of the United States. The Court will in this opinion resolve that question.

Historical Background.

The period in which the factors involved in this case developed has been generally limited in the proofs to the period from 1930 through 1955. The controversy itself involves the loss of business by the railroads to the long-haul trucks in interstate commerce during that particular period. It is candidly admitted by defendant-railroad companies that in the year 1930 the competition for long-haul

freight transportation was de minimis. There were only some 28,000 of the so-called "big trucks" in the entire United States. However, in the early 1930's with the improvement of highways and mechanical equipment, it became obvious to the railroads that the carriage of goods by trucks, instead of by railroad, was a growing business with which the railroads had to concern themselves. Accordingly, a joint committee of railroads and highway users was instituted to consider the problem. This committee was comprised of truck manufacturers, railroad officials, and officials of motor federations and associations, representing only the then organized automobile clubs. The truckers, as such, had up to that time formed few associations and those in existence were not very forceful in representing the trucker. In any event the truckers were not represented on the committee. That committee filed a report recommending that users of highways be charged for such use as they made of the highways and that a base [fol. 56] construction rate for roads should be determined with reference to the smaller private automobile and so-called pickup truck and that any excess cost should be met in increased fees to the heavier vehicles proportional to the amount of the increased cost. The committee also jointly approved standards of road construction, known as the AASHO standards, promulgated by the American Association of State Highway Officials, which standards recommended a maximum of 18,000 pounds for axle loads for all vehicles. Significantly, however, the recommendation of the Commissioner of Public Roads of the United States of standards for gross weight and size of vehicles to make these standards uniform among the several states was, primarily at the instance of the railroads, not accepted. In the Atterbury-Swayne Report (containing the Committee's findings) it was recommended that limitations as to these two items be left to individual state action.

That the railroads were very seriously concerned with truck competition in the latter part of the 1930's and lobbied for antitruck legislation, both in Congress and in the Legislatures of the several states, is completely demonstrated in the report of the Committee on Interstate Commerce, pursuant to Senate Resolution 71, (74th Congress) Report

No. 26, part 2, rendered on October 16, 1941 to the 1st Session of the 77th Congress, and known as the "Wheeler Report". This report condemned the railroads for what the committee termed as being "more concerned with the selfish interests of a few rather than the needs of the transportation industry as a whole". The report further pointed out that the method adopted by various railroads and railroad associations to combat the inroads of the trucking industry was not a method designed to meet truck competition by improvement of railroad service, nor was it a means for adjusting the railroad industry to the fact that there are certain functions for which motor vehicles are especially adapted. It concluded that the program as developed at [fol. 57] that time planned to impede truck and bus competition by the erection and enforcement of legal barriers. The program had its beginning at least as early as 1932. It had two major aims: the enactment of laws and ordinances designed to harass the trucking industry, and the stimulation of enforcement of such laws, ordinances and regulations. The above noted report further condemned the action of the railroads in secretly subsidizing so-called independent organizations and foundations which stated publicly that they were only interested in the objective "presentation of facts" but which were actually either completely subsidized or dominated by the railroads through financial support and otherwise.

Despite the combined antitruck opposition of the railroad associations of the United States, the trucking industry continued to flourish. At this point I must, for clarity in this opinion, state that hereafter when the term "trucking industry" is used, it will be used in connection only with that small segment of the entire trucking industry called the "long-haul truckers" which has to do with vehicles of a minimum of 18,000 pounds axle load and gross weight of 30,000 pounds and upward. The number of this type of motor vehicles or so-called "big trucks", while increasing yearly, at present constitutes only 1% of all vehicles using the public highways. The case under consideration is limited to that group.

The Pennsylvania Railroad itself entered the trucking field during the decade of 1930 to 1940 and operated a fleet

of long-haul trucks. In charge of this operation was one Mr. Raymond J. Littlefield, who was at that time, had been for many years before, and still is one of the experts in the railroad business in the analysis and study of the trucking industry in competition with the railroads. This operation was later ordered discontinued, and as testified to at the trial, based largely on the premise that the weight restrictions of the State of Pennsylvania prevented operation of [fol. 58] these units at a profit. With the advent of World War II and because of government restrictions on the manufacture and operation of motor vehicles, the trucking industry as such and as a competitor to the railroads collapsed. The railroads during World War II carried 95% of all freight and 90% of all passengers. Antitruck activities during this period on the part of the railroads were completely abandoned. With the conclusion of World War II and with the truck manufacturers again in operation, bigger and better trucks appeared on the market and were put into operation by the trucking industry. From 1946 to 1949 marked inroads were made by the truckers in the competitive market of long-haul interstate freight. This was apparent to the railroads and they frankly admit in this action that the competition was obtaining business from shippers who for many years had used railroad facilities exclusively. There was a marked reduction in carloadings in many particular commodities even though the total production of that commodity in overall manufacturing totals exceeded by far the production of previous years. It was clearly apparent to the railroads that not only the flexibility of movement but the saving of time were important elements in this erosion of railroad business, despite the uniformly much higher rates which the shippers were forced to pay to the truckers as contrasted with the railroad rates. It was clearly apparent to every railroad official concerned with the question that steps had to be taken to preserve the economic status of the railroads in the competitive market.

The trucking industry in the meantime had not rested on its oars. After the Atterbury-Swayne Report the truckers banded together in a national organization, known as the American Trucking Association, and State Trucking

Associations, similar to PMTA, were organized in every state. These associations became very active in their respective states, lobbying for increased weight limits so as to permit the carrying of greater "pay loads". In general, [fol. 59] their activities resulted in success in raising the minimum weight limits and permitting the carrying of heavy loads. In Pennsylvania the weight limit as of 1941 was 18,000 pounds for axle loads. In 1943, as a temporary war measure, they sought and obtained a limit of 20,000 pounds per axle load. In 1945 by Act of the Pennsylvania Legislature the temporary war measure became a permanent measure and remained as the axle load limit throughout the period involved in the present proceeding. Again in 1947 and 1949 the truckers sought an increase of weight limits in Pennsylvania, which limitations were actively opposed by the association of railroads as well as several other organizations to be discussed later. The bills were never passed by the Legislature. During this period many unscrupulous truckers violated the weight limits rather consistently on the theory that it was cheaper to pay the nominal fine of $50 for overloading than to keep the weight of the truck at legal limits; the excess load paying far greater dividends than the charges in the nature of fines for overloading. It was in this setting that the activities hereafter related occurred.

Railroad Activities.

As aforesaid, the use of long-haul trucks for interstate hauling of freight had increased so enormously by May of 1949 that it was a matter of immediate and vital self-interest to the railroads to do something about the erosion of what had been up to this time almost an exclusive monopoly of long-haul freight transportation. At first blush, to the ordinary person it would appear that the primary concern of the railroads might have been directed to improving service and to attempt to meet by more flexibility and speedy delivery the growing competition of the truckers. The evidence in this case has disclosed there were certain areas wherein the trucks could not compete. It was testified that the trucks could not compete with the

railroads in taking the coal out of the mountains of West [fol. 60] Virginia since one diesel engine could take a great number of cars on the downgrade of the West Virginia mines to the Norfolk breakwater. That the railroads would continue to enjoy this type of business was completely self-evident. On the other hand, the greater flexibility of the truck and the speedier delivery of goods were elements in the competitive market which the railroads might themselves have attempted to meet by the use of trucks or otherwise. The door-to-door feature of truck delivery was also important. However, the record in this case is barren of any attempt on the part of the railroads to adjust their thinking and their actions to meet this definite threat to a segment of business theretofore enjoyed by them. They engaged in what has been termed throughout the trial of this case as a "concert of action" to "improve their position" in the long-haul freight competitive market. And here is how they did it.

In May of 1949 the evidence discloses that the top executives of the Pennsylvania Railroad, before attending the May 19th, 1949 meeting of the Conference, were considering a campaign for Federal and State taxes against users of highways, waterways, etc. The recommendation which came out of this consideration was that they should explore the possibility of organizing private motorists and other groups to be held out to the public as completely nonrailroad inspired for the sole purpose of restricting the truckers by making their operations so expensive that they could not operate at a profit. The obvious corollary is that the railroads would be the beneficiaries of these restrictions. On May 19th, 1949, at a meeting of the Conference, there was appointed a Competitive Transportation Committee with Subcommittees designated Legal, Research, and Public Relations. David I. Mackie, then vice-president of the Delaware & Lackawanna Railroad, was made Chairman of the Legal Committee. Raymond J. Littlefield, tax agent and later general agent of the Pennsylvania Railroad, was made Chairman of the Research Committee. Thomas J. Deegan, [fol. 61] Jr., then executive vice-president of the Chesapeake & Ohio Railroad, later staff vice-president of the Allegheny Corporation, operators of the New York Central

Lines, was made Chairman of the very important Public Relations Subcommittee. While these three subcommittees maintained an effective liaison, the most active and most potent of the committees was the Committee on Public Relations. Deegan and his subcommittee determined on a plan of operation. The single objective of the campaign was harassment of the long-haul truckers. One of the objectives was the enactment of legislation, not under the sponsorship of the railroads but by others acting on their behalf, by what was called in inoffensive and pleasing language, "The third-party technique".

The campaign was to begin in New York, New Jersey and Ohio, and other states were to be brought in later as the program developed, consistent with the degree of success of the program. It was also determined that the campaign should be handled through an independent public relations firm. A number of public relations firms were interviewed and of the four or five selected for interview, all were leaders in that particular field. It may be noted in passing that of those interviewed and who submitted proposals, about which proposals testimony was given at the trial, each and every one of the suggested programs provided for a campaign of publicity to put the truckers in a bad light with the public; to encourage normal public resentment of the motoring public to the operation of big trucks on the highways; to secure the assistance of organizations which were apparently "independent and public spirited" in the campaign against the truckers, and to create a demand for legislation penalizing the truckers either by limitation of size and weight or the imposition of user taxes which would make their operation unprofitable.

A presentation was made by the defendant-Byoir firm prior to the execution of the contract on August 15, 1949. Byoir's presentation laid great stress on the success of [fol. 62] that firm in prior legislative campaigns, particularly its success before the Louisiana Legislature in reducing a tax on sulphur; in the Spring of 1938 before the New York Legislature in opposing a chain store tax; in connection with A & P activities which will be discussed later in the opinion; in 1948 before the Congress of the United States in connection with the distilling industry, and finally in

connection with the manufacturers of floor and wall tile with regard to building code changes which Byoir claimed his firm had secured for that industry in some two thousand cities. After the contract was awarded a memorandum of agreement was executed providing for payment to Byoir of $75,000 a year, plus reimbursement of each and every expense of any sort involved in the campaign. Byoir immediately organized a staff to put the program into effect and execution. The understanding of the Byoir organization as to its duties in connection with the campaign, set forth in extenso in Exhibit P5, is entitled "The Objectives".

While the ultimate objective is shrewdly set forth as legislation affecting the truckers, the intermediate goals are also set forth, all designed and aimed at injury to the truckers. These objectives, including the crystallization of motorist resentment arising from commercial heavy truck operations over the roads, were designed to arouse the public generally of the need to obtain new methods of financing public highways and by methods which would not appear to emanate from railroad sources. The total objectives were ostensibly set forth in a memorandum to the Department Heads of Byoir by Reynolds Girdler, Account Executive of the ERPC Account, dated September 13, 1949, in which he paraphrased the National Transportation Policy of Congress to suit his own needs, interpreting it for the purposes of the campaign as a National Legislative Policy and that (1) airlines should be used for speed; (2) trucks for short hauls and (3) only railroads for long hauls. He pointed out that if this program could be made effective [fol. 63] through public relations the railroads' financial troubles would be at an end. He also pointed out that "our" newspaper stories, magazine articles, pictures and radio programs will be concerned with what the national transportation policy should be, dramatizing highways and heavy trucks in the following particulars: (1) highway construction costs; (2) highway safety and the part trucks play in lack of safety on the highways; (3) highway damages by trucks; (4) state revenue and expenditures; (5) general taxation stories; all geared to reflect discredit upon the heavy truck industry and all to be done without attribution to the railroads. The magazine department of Byoir

was directed to "plant" stories in magazines for later use in the campaign as authoritative sources of factual information. More will be said of this later in the opinion.

It was estimated that the cost for the first year would exceed $350,000. Girdler's memorandum was circulated to the railroads and rather glowing commendations were received from several of the committee members involved, particularly from Walter Franklin, President of the Pennsylvania Railroad; Raymond J. Littlefield, who has been introduced above; and Walter Touhy, President of the Chesapeake and Ohio Railroad, Chairman of the Competitive Transportation Committee; as well as others.

While it would be very interesting to outline the Byoir campaign over the period 1949 to 1953, the details of which were testified to by the many witnesses called in this proceeding, it would unduly prolong this opinion and such an outline of details is unnecessary for a complete understanding of the case. Therefore, the campaign as inaugurated and carried out by Byoir and the Committee on Competitive Transportation of the Conference and its total effectiveness will be only briefly outlined under activities embracing: (1) The State of New Jersey; (2) The State of New York; (3) The State of Ohio; (4) Magazine Activities; (5) Road Test One—Maryland and its connotations; (6) The State of Pennsylvania; and (7) The Campaign of Vilification.

[fol. 64] New Jersey Activities.

While the program was geared for operation throughout the 17 states in the northeastern part of the United States, the Committee on Competitive Transportation determined to center its efforts in three states—New York, New Jersey and Ohio. At the outset, one C. Colburn Hardy was selected as the Byoir representative to inaugurate the New Jersey campaign. Hardy had for many years been in the public relations business and had served several terms as a New Jersey Legislator. Liaison was effected with the President of the Associated Railroads of New Jersey, one Blackson, and his assistant, one Simpson, with David I. Mackie, vice-president and general counsel of the Delaware & Lackawanna Railroad; one Pevler, vice-president of the Pennsylvania Railroad, and one Viviano, general

counsel for the Lehigh Valley Railroad. It was determined to reactivate an organization known as the New Jersey Automobile Owners, Inc. of which one Stelljes was executive vice-president, and one Fred Fox, secretary. Its offices actually were in the Byoir organization headquarters at 10 E. 40th Street, New York City, New York, with a mailing address from a small apartment in an apartment house in East Orange, New Jersey. In addition there was organized a new group, the New Jersey Citizens Tax Study Foundation, an organization whose dominant member was Hardy, its secretary.

The general purposes of the campaign were: (1) to stir up as much resentment against the trucking industry as was possible among highway users, with special emphasis upon the motorists, farmers and local truckers; (2) the lowering of truck weights and the increase in truck fees; (3) a weight-distance tax whereby users of New Jersey roads would be charged a mileage fee based upon weight carried and distance traveled on the highways of New Jersey. Hardy with his knowledge of New Jersey politics was in a key position to be extremely effective in such a [fol. 65] campaign. He had the help of Blackson, David I. Mackie, above mentioned, who was no stranger to legislative halls, and the research facilities of the Eastern Railroad Transportation Committee headed by Raymond J. Littlefield. Macwithey, President; R. J. Stelljes, Vice-President, and Robert Fox, Secretary, of the New Jersey Automobile Owners, Inc., were all avid publicity seekers who lost no opportunity to make speeches, give press releases of the speeches and demand of the legislature restrictions on the trucking industry. In this they were ably assisted by Hardy who paid all of their expenses, wrote practically all of the speeches, sent out thousands of publicity releases, prepared and printed in New York but mailed in New Jersey by a representative of Byoir. Copies of each release, however, were sent to the three officers in order that they be kept currently informed of Byoir's activities on their apparent behalf. Not one word of the railroads' part in the picture ever seeped through to the objects of their consideration—the long-haul truckers.

Another suggestion which was made part of the campaign was to create by grass-root methods, through editors of weekly papers, The Grange and other organizations, a demand for more highway funds. The object of this was clearly to point up increasing costs of road building and maintenance, and after having created the demand to suggest and then campaign for the weight-distance tax. The organization of the New Jersey Citizens Tax Study Foundation in this posture of the campaign began to pay dividends. One Fred K. Goodwin was the Executive Director and he was paid by Byoir and worked very closely with Hardy. A questionnaire was prepared and circulated to obtain "independent public reactions" to possible sources of tax money. The questionnaire was so devised with the help of the Byoir organization to make certain that a weight-distance tax would be the least painful choice to the general public. With that as a statistic and from an apparently independent authoritative source, Byoir was able to step [fol. 66] up among editors, writers and other media of communications the clamor for a weight-distance tax. It must also be remembered that all during this time a campaign of vilification against the trucking industry generally was going forward, the outline of which campaign will be later referred to in this opinion.

New Jersey had two years earlier adopted a new constitution. One of the elements was a tax study commission headed by Dr. John S. Sly of Princeton University, who also headed the Princeton Surveys. Dr. Sly was apparently, to the public at least, one of the most outstanding and disinterested persons in the State of New Jersey in connection with the tax study. It was the committee headed by him that made recommendations to the Governor and to the Legislature with respect to taxes in the State of New Jersey. However, the evidence in this case clearly indicates that Dr. Sly was working in the interest of the railroads. According to documents from Byoir files he worked in so close an association with Hardy that he was perfectly willing to accept Hardy's recommendation to place before his committee the virtues of the weight-distance tax, and in such a manner that the connection of the railroads therewith would be completely concealed or obscured. The results of

this campaign were extremely pleasant insofar as the railroads were concerned. Without elaborating too greatly upon the details of the campaign it will be sufficient to state that because of the ostensible grass-root campaign emanating from persons apparently with no railroad ties, the maximum axle load permissible on the highways of New Jersey was reduced and a marked increase in truckers' fees was obtained. While the campaign was not completely successful in that no weight-distance tax was imposed upon the trucking industry, the responsible officials of ERPC expressed their complete satisfaction with the results actually obtained.

In connection with the campaign to persuade editors to take an antitruck position, Byoir through Hardy subsidized [fol. 67] an apparently independent journalist who distributed a column of political news to the editors of weekly newspapers in New Jersey. Byoir provided complete coverage during the legislative season of eight weeks for all of the weekly newspapers of New Jersey, at no charge. Needless to say the columns so syndicated did nothing to advance the cause of the trucking industry and the columnist was well compensated by Byoir for his efforts on behalf of the railroads, whose connection with the activity was carefully concealed not only from the public but from the editors who used this material.

Representations were made to the then Governor of New Jersey, Alfred E. Driscoll, on behalf of the New Jersey Automobile Owners, Inc., protesting against a rise in the regular gasoline taxes; a rise conceived in the mind of Byoir and one which this record fails to disclose had ever been proposed by any responsible organization. The purpose of this, of course, was to again deliver a broadside against the trucking industry and to urge the imposition of a weight-distance tax against it. Hardy himself together with Stelljes traveled the length and breadth of New Jersey speaking before civic organizations, such as; Lion, Rotary and Kiwanis Clubs, and not one of the thousands of the businessmen of New Jersey who heard these speeches and violent denunciations of the trucking industry had the faintest conception that the ERPC was paying for the very gasoline that brought the speaker to the door of the meeting

hall. All in all Hardy and his railroad friends were eminently successful in their attempt to arouse the people of New Jersey to strike out at the trucking industry through the method of weight limitations and higher fees, and that work was not done to help the railroads but to injure the truckers. There was nothing of a constructive nature done by Hardy at any time to obtain better public relations for the railroads nor to secure any legislation favorable to the railroads. The truckers throughout remained the target [fol. 68] of this subterranean campaign to place them in a light with the public which was anything but favorable and wholesome.

One final observation on the State of New Jersey and the limits to which Hardy went to conceal the railroads' participation in this campaign. One astute editor questioned the sincerity of the New Jersey Automobile Owners, Inc. and in effect called it a paper organization "fronting" for some unknown principal. Not only did Hardy answer the letter denying any connection, particularly with the railroads, but he circulated his reply to every editor of every newspaper in the State of New Jersey in words of his own choosing on letterheads and in envelopes of Automobile Owners, Inc. paid for by the railroads and with postage paid for by the railroads. The ostensible writer of the letter was Stelljes, but the thoughts and words were Byoir's and Hardy's. The contents of the letter were nothing but complete fabrications and falsehoods. Many other illustrations of the type of campaign engineered by Hardy, Mackie, Littlefield, and others might be given but they are not necessary to a decision in this case.

New York Activities.

When Byoir undertook to represent the railroads in the summer of 1949, it found in New York State that the railroads had already enlisted the aid of many civic organizations and were themselves utilizing the "third-party technique". Outstanding were two organizations: The Citizens Tax League of Rochester, New York, whose secretary A. J. Menzie apparently delighted in public controversy, and The Citizens Public Expenditure Survey, Inc., an independent public-spirited organization originally

formed for the purpose of scrutinizing the budgets of all governmental political divisions and subdivisions from the state itself to the smallest municipality.

Through agricultural agents employed by them the railroads had been able to enlist the sympathetic coopera- [fol. 69] tion of many prominent Grange members to present their viewpoint against the truckers to the public. But they were in need of statistics to bolster their contentions and it was important that any review come from an apparently independent source. They decided that should a survey of highway users and the revenue derived from them for road construction and maintenance be sponsored by the railroads it would be of little, if any, value. Therefore, it was determined to have such a survey made by an independent source. Griffinhagen & Associates, consultants in public administration and finance, with offices in Chicago, New York, Boston and Los Angeles, were chosen to make the survey. The sponsor was The Citizens Public Expenditure Survey, Inc. This survey which was completed and documented in February of 1950 again had no apparent railroad relation and seemingly was what it purported to be, a completely objective independent analysis of the highways and highway use and revenue conditions in the State of New York. To put it in its proper perspective, however, the evidence in this case discloses that during the years 1951, 1952 and 1953, substantial "subscriptions" in uneven amounts were made to the Citizens Public Expenditure Survey, Inc. by the Pennsylvania Railroad. The evidence also discloses that Mr. Littlefield, after the passage of the weight-distance tax bill on trucks in New York, sought a vote of thanks for Mr. Dugan of the New York Central for his efforts in bringing Griffinhagen to New York for the survey and the results of the survey. Over and above that, weekly reports of Kiely, Byoir's New York representative for the ERPC, clearly indicates that Kiely directed the activities of both Walter Howe, executive director of Citizens, and one Finke, head of its so-called research department. The closely knit cooperation of these three individuals was such, together with the "subscriptions" which appear rather to be "assessments", that the inference is inescapable, and the Court so finds, that the railroads paid for

the survey and subsidized the activities of Messrs. Howe and Finke.

[fol. 70] With the Griffinhagen report as a basis, Kiely toured New York State and "sold" the railroad story to editors, the Mayors Conference, County Supervisors, Chief of Police Associations, Rural Letter Carriers, Members of the Grange, and other organizations. He also worked closely with The Citizens Tax League of Rochester, New York, and used that organization for the dissemination of literature unfavorable to the truckers. Byoir absorbed all of the costs of this distribution and paid the secretary Menzie a substantial fee of several hundred dollars for the so-called research, which the Court finds was for the use of his position. In order to obtain more extensive publicity Byoir formed the Empire State Transport League, a strictly paper organization, with its principal office at a desk in a Public Stenographer's office in Albany, New York. Byoir induced many prominent New Yorkers to lend their names to this paper organization. The amount of antitruck literature and news releases critical of the truckers put out by this organization was prodigious. Of course, it was all at the expense of the railroads without any attribution of responsibility to the railroads.

While there is naturally a scarcity of evidence as to the connection of Byoir with the Legislative Committee of the New York State Senate, which had the weight-distance tax bill before it in the year 1950, it is significant that when Senator Manning, the head of that committee, came up for election in a later year he became extremely resentful of rumors that Byoir had written the Senate report recommending the weight-distance tax and refused to let Byoir relate any further remarks to him. The inference is again inescapable, and the Court so finds, that Byoir's representatives were working in close contact with his office during the pendency of this particular piece of legislation and were responsible for many of the news releases which came out under his authorship.

As in the case of Stull in Ohio, who will be later discussed, and Hardy with Pevler and Mackie in New Jersey, [fol. 71] Kiely did a magnificent job of grass-root selling. He persuaded the Rural Letter Carriers, the Grange, and

the Mayors Conference to adopt resolutions at their state conventions, several of which were actually written by him, denouncing the truckers and urging strict enforcement of the weight-distance tax. Under the letterhead of the Empire State Transportation League he urged the Sheriffs of every county of the state to enforce the strict penal provisions of the weight-distance tax, particularly with regard to overloading. He sought out legislators, particularly members of the Highway Committee, and solicited the introduction of and urged the passage of an act giving local communities, through their local police organizations, the right to arrest the drivers of overladen trucks and impound the trucks if necessary. The bait held out was that local communities could profit from the high penalties set forth in the weight-distance tax law for overloading. He worked also with his friends in the Grange, in the Mayors Conference, and in other organizations to put pressure upon the political leaders to see that the Legislative Committees were composed of legislators favorable to the railroad point of view.

In addition to the Griffinhagen report, the Byoir organization was able to obtain further statistics against the heavy trucks by so-called public opinion polls. The media for obtaining this information was Fact Finders, Inc. and the Princeton Polls, the latter headed by Dr. Robert Sly, head of the New Jersey Tax Study Commission. The questions were framed in the light of a demand carefully nurtured by Byoir, through the Grange, the Mayors Conference and others, to obtain a greater allotment of state funds for local community roads. While very astutely, and apparently innocently worded, the bold import of the questions presented to individual persons ran substantially as follows: Since more money must be obtained for roads, do you prefer: (1) increase in passenger car registration fees; (2) increase in the motor fuel tax; (3) increase in the charges made for the use of the highways by the heavy [fol. 72] trucks? It could certainly be less than human if an overwhelming majority of the people approached would not vote for the third proposition, to wit: tax the truckers! These public opinion polls at the cost of many thousands of dollars were inaugurated by and subsidized by Byoir on be-

half of and at the expense of the railroads. The results of these polls received the widest publicity that Byoir could give them both on the metropolitan level of all the larger cities of the State of New York, in National magazines, where possible, and with particular emphasis on the country weekly newspapers. In that regard it might also be noted that Kiely was also able to obtain the cooperation of a few editors of weekly newspapers who printed strong editorials against the truckers.

Defendants argue that these antitruck statements contained the considered opinion of the editors and that it was merely another facet of the freedom of press and speech guaranteed by the 1st Amendment to the Constitution of the United States. This argument would certainly carry great weight were it not for the fact that Kiely, a highly placed and highly paid employee of Byoir, had written the editorials himself in furtherance of the Byoir-railroad objective. In accordance with standard operating procedures, these skillfully written diatribes against the truckers received the widest possible publicity and became part of a Byoir kit for presentation to the next editor.

In this posture of the case it might be well to also note that much of the success of Kiely and the others in "planting" these ideas with editors was due to the fact that apparently independent writers of recognized stature had written articles about the damage that truckers did to roads. As will be related hereafter under the headings "Magazine Activities" and "Campaign of Vilification", these articles in outstanding magazines of national circulation, the names of which will also be hereafter related, were based almost exclusively on data furnished by Byoir and written or edited by Byoir before appearing in these magazines.

[fol. 73] To keep the case in proper perspective we must recognize that Kiely, Stull, Hardy, et al., were on the payroll of the ERPC through Byoir; that their entire salaries and expenses were reimbursed by ERPC to Byoir; that their job was to create public dissatisfaction with the truckers, arouse animosity against the truckers, and all to the final purpose that the railroads might at the least limit the activities of the truckers in the long-haul industry or if completely successful destroy them as a competitive factor

with the railroads. Bluntly stated, all were working to accomplish injury to a business competitor within the prohibition of the Sherman and Clayton Antitrust Acts.

The results of Byoir's work in New York in conjunction with Messrs. Littlefield and Deegan were extremely gratifying to the Research Subcommittee of the ERPC. In its report dated June 20, 1951 to Mr. Walter Tuohy, Chairman of the Special Transportation Committee, the following pertinent language is found:

> "7. Research Committee has acted more or less as liaison between State Railroad Associations and the Carl Byoir group. In June, 1949, the Policy Committee named the states of New Jersey, New York and Ohio as trial states. The Carl Byoir group, under the direction of Mr. Girdler, placed the facts before state administrations and otherwise gave the states a vast amount of help, resulting in favorable truck legislation in New Jersey and New York.
>
> "8. The Mileage Tax Bill, which passed the New York legislature in April of this year, was of outstanding importance. This is the first state east of the Mississippi to put a substantial mileage tax on trucks. Other states are watching this development. The New York authorities advise that they expect to build 50 weighing stations scattered throughout the State.
>
> "9. After the New York Bill passed, the Carl Byoir people concentrated on Ohio. A Bill was passed [fol. 74] increasing truck license fees about 30%. There is much more to be accomplished and the campaign will be resumed at the next session of the legislature.
>
> "10. The first of June, the railroads of Pennsylvania unanimously requested the help of the Carl Byoir people, and a man has been assigned."

Ohio Activities.

The State of Ohio posed one peculiar problem to the Byoir organization. Representing the Goodrich Tire & Rubber Company, which of course was vitally interested in

automotive equipment and the sale of tires, Byoir found itself in the predicament of representing opposing interests. Nevertheless, following the pattern of New Jersey, Byoir threw the weight of its organization behind Donald Stull, who had charge of the Ohio activities. The success of Stull in Ohio in advancing the interests of the Byoir-ERPC plan was little less than phenomenal. T. J. Kauer was Director of the Ohio Department of Highways; Harold Cohen was the Chief of the Bureau of Public Relations for the Ohio Department of Highways. Kauer was also Chairman of the Interregional Council on Highway Transportation which had charge of the Maryland Road Test. Stull had complete access to their offices and worked closely with them. He also, through Kauer, apparently had entree to the office of Governor Lausche. Building up a grass-root campaign against the truckers through the use of "independent factual data" obtained from sources apparently independent but based completely on Byoir material, he was successful in creating a wave of indignation towards the truckers which resulted in an increase of fees to the truckers in 1951 of approximately 30%. Again, through Kauer, he was able to "educate" the members of the Ohio Legislative Highway Investigating Committee. In 1952, according to a Byoir report, Stull had done such "an efficient job of education" that there arose a public demand for taxation on heavy trucks.

[fol. 75] There was also a gubernatorial campaign in Ohio that year. Charles Taft, the Republican candidate, adopted the proposition that trucks should pay higher taxes "based on weight carried and miles traveled". Stull reported to Byoir that up to three weeks before Election Day, Lausche, the incumbent, had planned to campaign solely on his record and was backing away from the ton-mile tax as a too familiar story and one already chosen by his opponent. What he needed, he told his aides, was "a dramatic story that could be told over TV". That was all Stull needed (according to Byoir). Using newspaper clips, editorials, magazine articles, etc., which as will be demonstrated later were practically all Byoir-inspired and paid for by ERPC, Stull demonstrated the apparent widespread public interest in the ton-mile tax. He also had available a Harper maga-

zine article by Senator Neuberger of Oregon entitled, "Who Shall Pay For Our Roads?", for the writing of which Byoir "research" had been made available, and which will be referred to in detail under the heading "Magazine Activities". Lausche campaigned just fifteen days. According to reports found in Byoir's files, in all but one speech he talked only the ton-mile tax; in every TV program he centered attention on truck taxation; waving copies of the Harper magazine article before the camera; pointing to placards showing the justice of heavy taxes on trucks; displaying Public Utility Commission records of violations by explosive-hauling truckers (the results of a Byoir-inspired investigation) and repeating the results of the Maryland Road Test (a distorted Byoir interpretation) to prove how badly big trucks damage highways. Again, according to Byoir, the data and, in many cases, the words and props were supplied by Stull. The Cleveland Plain Dealer stated categorically "Lausche's astonishing victory, against the political tide, can be construed as an endorsement of his highway program". Stull did his job so well that the truckers were forced to abandon their early charges that the "bills were railroad inspired"—which they were.

[fol. 76] In addition and as part of his program Stull introduced into Ohio the "Save Our Highways Club". This was an organization founded by railroad employees in Tennessee and its entry into Ohio was completely financed by Byoir for which it was reimbursed by the railroads. Literature in profusion was mailed to legislators, granges, farmers' organizations and automobile clubs. All of it was critical of the trucking industry. All of it was calculated to and did bring the trucking industry into public disrepute. Again, a magnificent job was accomplished in keeping any information as to the true position of the railroads in this campaign from the general public. The rise in fees and the campaign for the weight-distance tax in Ohio were two of the outstanding accomplishments of Byoir for the railroads in the entire campaign.

Two other aspects of the Byoir-Stull campaign are worthy of mention. The records of the Byoir organization introduced in this case demonstrate clearly that copies

of Governor Lausche's correspondence with protesting truckers were in the hands of Byoir before the correspondence even reached the United States mails, and to quote Stull, it "contained our poison". This again points out that Kauer and Cohen were working diligently for the interests of the railroads.

While defendants have vigorously argued that the term "poison" was nothing but public relations jargon, I find that Stull meant exactly what he said and in the ordinary context of the words used. It is clearly apparent that the political campaign against the truckers was based on slanted statistics created by Byoir for the railroads and that most of the data used in the speeches, if not the speeches themselves on both sides, Republican and Democratic, stemmed directly from the Byoir organization. While the trucking industry and its members were intellectually certain that this apparent grass-root uprising against the industry was definitely railroad inspired, so well did Stull and Byoir work that it was impossible to document and prove it. The net result was that the trucking industry [fol. 77] faced a hostile public opinion in Ohio because of the method of distortion and overemphasis of the admitted shortcomings of the industry on the part of Byoir. This statement will be amplified in the heading "Vilification Campaign".

Magazine Activities.

One of the most unusual of Byoir's employees, the head of the Magazine Department, was Patricia Lochridge Hartwell. Mrs. Hartwell, whose professional name while she was with Byoir was Patricia Lochridge, joined the Byoir organization in November of 1949 and was assigned to the ERPC account. She thereupon set out to develop magazine articles which would portray the railroads' point of view and would be unfavorable to the trucking interests. Her method of operation was to interest an editor of a magazine in a story and if the editor thought it had sufficient merit he might assign one of his staff writers or editors to do the piece. In that event Mrs. Hartwell would furnish the writer with the data which Byoir had compiled, which data of course was always slanted against the truckers.

She also made use of free-lance writers. She would interest them in a particular story and pay them while they researched the proposed story at Byoir's or at other places, which amounts in many instances ran into several hundreds of dollars. Since the ultimate aim was to hurt the truckers, any such payments were reimbursed by the railroads, and should the free-lance writer be able to sell the article to a magazine the entire fee went to the writer. In other words, Byoir paid the writer during the preparation of the article and the magazine paid him for writing it. In the extremely limited number of instances that a writer contemplated an article which would be favorable to the railroads' point of view with respect to the truckers, Byoir extended every facility it possessed for use of the writer and at no cost to the writer.

The worth of such a project in the attainment of the ERPC goal cannot be minimized. In addition to the ordi- [fol. 78] nary extensive circulation which the magazines themselves possessed, it was possible, at railroad expense, to circulate reprints of the articles widely to civic organizations, state, city and government officials, as well as to legislators and other individuals who were concerned with public opinion. While it is true that her efforts in every case did not meet with complete success, she was successful in having enough magazine articles released to make an important contribution to the railroads' antitruck campaign. Without attempting to individuate the details of each article, it will be sufficient to recount some of the articles published and Byoir's connection with them.

The first article, "The Giants Wreck Highways" with a subtitle "Heavy Trucks Are Making Their Runs On Your Tax Dollars", appeared in the April, 1950 issue of EVERYBODY'S DIGEST. It was based almost completely upon Byoir's research and development. In the same month Byoir claimed credit for having furnished minor research and comment for an article by Senator Joseph C. O'Mahoney entitled, "What Bad Roads Are Costing Us", which appeared in the April, 1950 issue of the AMERICAN MAGAZINE.

Early in 1950 Mrs. Hartwell presented an outline of a story about truck damage to roads to the editor of HARPER'S magazine. This outline was very extensive and

Harpers evinced interest in it. Thereafter Mrs. Hartwell contacted Myron Stearn, an independent free-lance writer, interested him in the story, furnished him with all the Byoir data on the trucks, and the completed product appeared in the September, 1950 issue of HARPER'S magazine under the caption, "Our Roads Are Going To Pot". At approximately the same time an article entitled, "The Rape Of Our Roads", by Frederick Brownell, a Byoir protege, appeared in the READER'S DIGEST. This article was condensed from a Buffalo Evening News story. These two articles became the first authoritative sources of so-called independent public attacks upon the trucking industry.

[fol. 79] Through the good efforts of Clinton Johnson, Director of Publicity for the Maryland Roads Commission, and a close associate of the Byoir organization, David G. Wittels, an outstanding writer for the Saturday Evening Post, in the September 16th, 1950 issue of that magazine wrote a very critical article entitled, "Are Trucks Destroying Our Highways?" Byoir furnished extensive national research in a five thousand word background memorandum to round out his story on the Maryland State Highway Commission Program. It was the same Clinton Johnson who persuaded Mr. Wittels to go to Maryland and actually research the story in the field; live with the highway crew, meet the highway commissioner, and find out what the problems were for himself. While the article justifiably was critical of a certain class of truckers, it must be realized that the initiative for the article stemmed from railroad-inspired sources and portrayed a particularly venal type of trucker as representative of the entire trucking industry. The distortion, however, was so skillfully done and so subtly written as to make a profound impression upon a casual reader of the article. Again, it is a variation of third-party technique approach, which technique in its application to this case will receive further attention.

Hardy Burke, "a sometime employee of Byoir" and a sometime independent free-lance writer, wrote an article in the April, 1952 issue of the NATIONAL GRANGE MONTHLY entitled, "HISTORY, TRUCKS AND MONEY". This article was actually authored by a Byoir ghost writer, James Miller, and according to Mrs. Hartwell "skillfully developed all

the major points in the ERPC campaign". This article, which pictorially highlighted the collapse of a bridge due to an overladen truck attempting to escape a weighing station on a main highway and the destruction of a detour on a main highway over a country road, was skillfully designed to arouse the farmers in opposition to the trucks.

Again, in the August, 1951, Sunday issue of PARADE magazine, which is a supplement to hundreds of Sunday [fol. 80] newspapers throughout the country, Clinton Johnson assisted Byoir in obtaining the insert of an article entitled, "TRUCKS: HELP OR HEADACHE?" This article completely critical of trucks contained the words and pictures of the Byoir organization.

In the July 30th, 1952 issue of PEOPLE magazine appeared an article entitled, "TRUCKS WRECK YOUR ROADS". This article again critical of the trucking industry was not only "planted" by Byoir but extensive circulation of reprints was made with the article appearing as the lead article on the cover of the reprint whereas the original magazine cover contained no such reference.

An article which represented an extremely important item in the railroads' campaign against the truckers was that which appeared in the April, 1952 issue of the COUNTRY GENTLEMAN. This article by Emilie Hall, described as "YOU CAN HAVE BETTER ROADS" was referred to by the magazine as a "new chapter in the farm roads story". The writer was discovered by Horace Lyon, a Byoir employee assigned to the ERPC account, and Mrs. Hartwell did most of the research and editing for the article, with Jim Miller and Dick Strouse of Byoir helping in some last minute rewrites. Quoting Mrs. Hartwell's appraisal of the publication of this article: "This was a difficult job to put across, entailing two complete rewrites of the article to satisfy both a pixie author and a difficult editor. This was accomplished without too much pain and the underlying philosophy of the ERPC account came through in the final draft." After various complications Lyon and Lochridge were able to get the article endorsed in a box which appeared on the first page of the article by the president of the all-important Association of American State Highway Officials. This article received widespread distribution at

the hands of Byoir but more importantly a motion picture based on this article was made for distribution to farm groups throughout the country. The story of how this motion picture came into existence, the purpose behind the [fol. 81] picture, and the ultimate success of the endeavor is significantly interesting.

For some seventeen years one Fred O. Bailey had served as reporter and farm editor of the United Press Association. During the years 1945, 1946 and 1947 he had served as Legislative Counsel of the National Grange. Subsequent to 1947 he served a number of national magazines in the farm field as a reporter and columnist. According to the testimony of David I. Mackie, one of those magazines served was the Country Gentleman. During the year 1951 Bailey had discussed the formation of a Farm Roads Foundation but nothing came of it during that year. However, the general idea of such a Foundation was to cooperate with and assist farm organizations and farm groups in planning for an adequate balanced roads program to serve their needs. The first and only function of the Farm Roads Foundation up until May of 1953, the date of Mr. Bailey's deposition in this case, was the distribution of a film, "Highways and Byways, U. S. A.", based upon the story in the Country Gentleman magazine, "You Can Have Better Roads". The evidence in this case discloses beyond peradventure of doubt that the moving force in the making of this film was the Western Association of Railroads. Bailey was approached by representatives of that association and offered an outright grant of a picture for distribution. It was not until this offer had been made that the Farm Roads Foundation was incorporated and came into being. The evidence is also crystal clear that Byoir, in conjunction with representatives of the Western Railroads Association, had been working on a script for this picture. In fact, Byoir edited the script. Dudley Pictures of Hollywood were commissioned by the association of railroads to make the picture and the cost of making the picture was divided between the Eastern, Western and Southern railroads on a basis of 18% to the Southern railroads and 41% each to the Eastern and Western railroads. The assessment to the Eastern railroads was $62,500. Based on the

[fol. 82] above percentages of assessment it would appear, therefore, that the cost of the film to the three railroad associations exceeded $150,000. This film, the cost of the public distribution of which (and it was most extensive) has always been borne through a grant by the railroads, was exhibited at the trial of this case and the film and a transcript thereof have been filed of record. The film is professionally and skillfully done. It demonstrates clearly the needs of the farmers for auxiliary roads and suggests united, combined, intelligent community efforts to obtain the necessary funds to bring about this very desirable result. The lasting impression, however, created by the picture is contained in a very few sentences of the dialogue and as the picture concludes; the lasting impact of the film is that big trucks do not pay their fair share of highway construction and maintenance. While extremely expensive it constituted a very important piece of propaganda carrying a terrific impact upon its viewers. Mr. Bailey whose cooperation had been sought in the editing of the script was completely unaware of the very important role played by Byoir. He had no idea of the cost of the film nor of the cost of distribution which was borne by the railroads. The distribution companies were employed to distribute the film through their regular agencies to farm groups and other interested parties. It was distributed free of charge for showing in regular moving picture houses. 186 colored prints were made in 16 millimeter size and 10 black and white 16 millimeter size copies were made for showing on TV. The testimony indicates that considerable use was made of the film on TV. Four 35 millimeter copies were made for showing in regular motion picture theatres. To a viewer of the picture it would appear that the sponsors were the Country Gentleman and the Farm Roads Foundation. No suggestion either in the title, dialogue or screen credits indicated the connection of the railroads with this film. Viewed as it was by millions, [fol. 83] the effect was most certainly to build up prejudice in the public mind against the trucking industry.

The final article which appeared shortly before the institution of this suit was an article, "WHO SHALL PAY FOR OUR ROADS", by The Honorable Richard L. Neuberger.

United States Senator from the State of Oregon. Mr. Neuberger before entering politics was a capable newspaperman and writer. He was also a Legislator in Oregon when the first weight-distance tax on heavy trucks was passed in that state. It would follow naturally that he should be an expert in that field. Hearing that Harper's magazine had discussed the writing of an article in connection with highway financing with the Senator, Mrs. Hartwell telephoned him at his home and discussed the article with him. She suggested that Byoir had splendid material on the national picture and suggested that such material might be useful to him in his article. As a result of this conversation the Byoir material was mailed to Mr. Neuberger in Oregon where he was working on the article. That he availed himself of the material is clear from a reading of the article. Byoir had been pyramiding data, mostly "planted" material, for a period of approximately three years and this was the authoritative material submitted to Mr. Neuberger. His article included generally the same "statistics" as every other article admittedly "planted" by Byoir. Byoir, of course, took no part in the reviewing or editing of the article but the impact of its "help" is clearly discernible throughout.

In commenting upon the above magazine articles it is not intended to convey the impression that the above represented the sum total of the Byoir efforts in the magazine field. They cannot and do not reflect the further extensive efforts of Byoir's Magazine Department and its success in putting over the railroads' point of view in other magazines of lesser importance and circulation. They merely outline the importance of the work of the magazine department in this field, since once articles were published they were ex- [fol. 84] tensively used by Byoir's representatives in selling their antitruck story to persons concerned with public opinion.

Road Test One—Maryland.

In 1949 the Governors Conference requested the Council of State Governments to study and report upon the matter of reasonable and uniform standards of motor-vehicle maximum-size-and-weight limitations. At the call of Gov-

ernor Lausche of Ohio and cosponsored by highway officials from 14 midwestern and eastern states a conference was held at Columbus, Ohio, on December 5 and 6, 1949, to consider the size and weight problem as a matter of interregional concern. Early in the deliberations of the conference, it became apparent that an objective determination of the effects of *axle loads* of various magnitudes would afford the only possibility of eventual agreement of the entire membership on the important question of axle-load limitations.

The conference formed itself into the Interregional Council on Highway Transportation and appointed a Committee on Test Roads. This special committee met in Baltimore, Maryland, on January 9 and 10, 1950, to inspect a test-road location proposed by representatives of the Maryland State Roads Commission. After visiting the site of the proposed test road, the committee decided that the project identified as Road Test One—Maryland was feasible and recommended that tests be conducted at the joint expense of the participating state highway departments and with Highway Research Board direction of the project. The highway departments of the following states: Connecticut, Delaware, Illinois, Kentucky, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, Virginia, Wisconsin and the District of Columbia, executed contracts with the National Academy of Sciences, of which the Highway Research Board was a component part, agreeing to participate financially in the cooperative venture. The project was administered and supervised by the said Highway Research Board through a small Project Executive Committee and an Advisory Committee. The Advisory Committee included one representative from each participating state, the Bureau of Public Roads, the Automobile Manufacturers Association, the Petroleum Industry, the American Trucking Association, and the Department of the Army. The Bureau of Public Roads provided personnel and instruments for measurements of surface roughness, slab strains and deflections caused by the test loads, soil surveys, and other necessary instrumentation and testing services, and also provided the services of the project engineer and three assistants.

[fol. 85]

The principal object of the test was to determine the relative effects on a particular concrete pavement of four different *axle loadings* on two vehicle types. The loads employed were 18,000 and 22,400 pounds per single axle, and 32,000 and 44,800 pounds per tandem axle. The tests were conducted on a 1.1-mile section of Portland-cement-concrete pavement constructed in 1941 on U. S. 301 approximately 9 miles south of La Plata, Maryland. The pavement consisted of two 12-ft. lanes, each having a 9-7-9 in. cross-section and reinforced with wire mesh. The road at the beginning of the test was in fairly good condition and insofar as the records of the Maryland Road Commission could determine the entire length of the test site was constructed on good granular subbase material.

There were four separate test sections. The first, which was the west lane of the southern half mile of the pavement under test, was subject to 18,000 lbs. single axle load; the second, which was the east lane of the southern half mile, was subject to 22,400 lbs. single axle load; the third, which was the west lane of the northern 0.6 mile, was subject to 32,000 lbs. tandem axle load; and the fourth, which was the east line of the northern 0.6 mile, was subject to 44,800 lbs. tandem axle load.

[fol. 86] The test truck operations began on June 12, 1950, for Sections 1 and 2, single axle loads, and the tandem heavier trucks on the eastern end began operation on June 23, 1950. Operations of all test trucks were continuous, on a 24-hour day, seven-day week basis, except when necessary to interrupt operations for vehicle and pavement maintenance and service, meals and rest stops for drivers, and special tests, such as strain and deflections. In addition, operations were suspended for 24 hours for three holidays during 1950: July 4, Labor Day and Thanksgiving Day. The drivers worked three 8-hour shifts and were allowed a 10-minute rest period each hour and 30-minutes for a meal in the middle of the shift. The 18,000 lb. axle load totaled 111,889 miles; the 22,400 lb. axle load totaled 111,792 miles; the 32,000 lb. tandem axle load totaled 106,008 miles; and the 44,800 lb. tandem axle load totaled 59,256 miles due to cessation of operations during the month of November occasioned by excessive damage to that part of the test highway.

This was to be, and was insofar as the Highway Research Board was concerned, a completely objective test. Mr. Herbert S. Fairbanks, Deputy Commissioner of the Bureau of Public Roads and Chairman of the Highway Research Board, estimated in his testimony in this case that the stress placed on the road during the pendency of this test would approximate 40 years of normal usage of the same road. Contrary to the general understanding of the content of the subsoil of the road, it became very evident as the test progressed that certain portions of the road, particularly that over which the heavier trucks ran, had a subgrade which consisted in great part of fine grain soil. When water permeated the fine grain soil the deflection caused by the weight of the trucks would push the water and solid matter from the subbase of the road and eventually this would create a hole or pocket under the road. The weight of the truck would then crack the concrete immediately over the hole or pocket. The water which [fol. 87] would lodge in these pockets or holes would be "pumped" up through the expansion joints of the road. While test procedures might have allowed normal maintenance of the roads, such as filling in and reinforcing these cavities under the road, deliberately and in the interest of scientific knowledge minimal maintenance was indulged in throughout the entire period of the test. Naturally this resulted in much faster deterioration than would be the case had normal maintenance been carried out.

It will be recognized that the impetus for this test came from Governor Lausche of Ohio. His Director of the Ohio Department of Highways, T. J. Kauer, Chairman of the Interregional Council on Highway Transportation, as such, had extremely close contacts with all features of the test. It will also be recalled that Harold Cohen, Chief of Public Relations of the Ohio Department of Highways, was a very close associate of Stull, Byoir's representative in Ohio. The purpose of this test was a scientific determination of what a road of this character could carry safely. The distortion of this aim and purpose, and the peculiar conduct of Messrs. Kauer, Cohen and Clinton Johnson, Director of Publicity for the Maryland Roads Commission, makes an interesting chapter in the Byoir-railroad antitruck cam-

paign. It was the purpose of Byoir to obtain as early as possible any information from this test which would support their theory that the *gross weight* of the truck (whereas the test was an examination of the effects of *axle load weights*) was alone responsible for breaking up roads. With this in mind close liaison was kept with Kaier, Cohen and Johnson. The records of the Byoir organization show that Johnson during the course of this test was a frequent visitor at the Byoir offices in New York and that the expense of his visits were borne by Byoir and reimbursed by the railroads. There also appear in the evidence many vouchers which indicate that the railroads reimbursed Byoir for entertainment of Johnson and his wife. Ultimately he became an employee of the ERPC, receiving [fol. 88] $1,000 per month plus expenses from December of 1952 through September of 1953. A further inference may be drawn from the fact that in an undated memorandum (P-121) from Hardy, Byoir's New Jersey and Pennsylvania agent, to Mr. Deegan, Hardy noted that in checking over the agenda of an ERPC meeting it occurred to him that Deegan might not want to discuss Johnson at the open meeting. He further mentioned that he talked to Littlefield about this and that he was interested in Deegan's idea. Hardy's explanation that the reason they might not want to discuss Johnson at the open meeting was because it was a mere matter of slight detail does not satisfy the Court (R. 745). While out-and-out bribery of Mr. Johnson has not been proven by a preponderance of evidence, the Court is satisfied that the plaintiffs have proved that Mr. Johnson because of the above-mentioned factors was not an objective public employee, but rather was working for the interests of the railroads in order to further his own personal goal of obtaining a lucrative position with the ERPC.

There is no doubt and the record abundantly proves that Byoir actually did get information about the test as it progressed. It was the purpose of Mr. Fairbanks and his associates that no conclusion be published until the full committee had time for a mature consideration of all of the factors involved in the test. From time to time, however, Byoir put out releases which indicated that big trucks, in the sense of gross weights rather than axle loads, were the

primary factor in destroying the roads and highways of this country. Byoir even released pictures terming the Maryland Road Test as a "Crackathon"; pictures which showed the pumping action when heavy trucks ran over joints where the subsoil was of fine grain sand rather than the granular subsurface which withstood the test of all of the weights with remarkable durability. If a "Crackathon" is a highly technical and scientifically controlled attempt to crowd into a period of several months the effect of roughly four decades of road use in order to determine what factors ultimately result in the break up of roads, Byoir used the proper appellation in describing the Maryland Road Test. But this Court finds that Byoir meant, and the reading public so interpreted it as meaning, that a "Crackathon" was the result which invariably followed from the use of heavy trucks on concrete roads. In a word—big trucks are the sole procuring cause of road destruction, rather than the true nature of the test which was to crack the road under controlled conditions.

[fol. 89]

Mrs. Hartwell likewise entered into this picture. She spent about a week at the site of the test, taking notes and watching the progress of the test, and did her best to get releases which would favor the railroads. She also sent a woman free-lance writer to the scene with instructions to represent herself as an editor of Colliers, which she was not. As such purported editor she was well received by all at the site including representatives of the American Trucking Association and she was accorded every courtesy possible. Her report to Mrs. Hartwell is a masterpiece of the venomous approach which anyone connected with Byoir took toward the heavy trucks.

One particular feature of the test and Byoir's approach to it deserves special mention. A running motion picture of the test at selected times was made for the Bureau of Public Roads. At the conclusion of the test and with the approval of Mr. Fairbanks, this motion picture was edited and narrated by a competent Washington, D. C. news commentator. The original so-called "long version" of the motion picture was shown at the trial of the case and the Court was impressed with the completely objective approach to the problem and the fair comments of the nar-

rator. Viewing the motion picture at the end of one day's session, the Court felt that the picture clearly demonstrated that the most important cause of cracking of concrete highways was the presence of a fine grain silty or clay soil subgrade. One important statement was made in the long version of the film:

> [fol. 90] "The test shows conclusively that a concrete pavement, of the strength and dimensions of the test road, will support indefinitely, without structural failure, single-axle loads as great as 22,400 pounds—*if* there is a subgrade, of adequate thickness, of non-plastic, granular soil. The equivalent of such support must be supplied by the design of the roads *in the future.*"

Among others, this important statement was carefully removed from the later shortened version of the film.

The film was in three parts. The first part showed pictures at the actual site with the narrator explaining methods of operation, the purpose, and some of the results. The second part was devoted almost entirely to a precise engineering explanation of the test and its purpose, illustrated by model trucks and drawings. The third part was the conclusion in which the narrator summarized the test, its purpose, and results. It was at this point that Byoir directly entered the scene. One of the Byoir representatives in Washington called upon Mr. Fairbanks and told him that the Byoir organization representing the railroads would like to have a copy of the film for distribution and showing to selected groups. Mr. Fairbanks demurred at the suggestion of Byoir that a shortened version of the film would be adequate to show the purpose and results of the test. Under considerable pressing by Byoir, Mr. Fairbanks said he would consider a shortened version of the film, if it could be demonstrated to him that it did not distort in any way the purpose of the test and the results obtained therefrom. Byoir then suggested that certain portions of the film be shown consisting of the first part of the film and the last part of the narrator's summary. The shortened version of the film was thereafter shown to Mr. Fairbanks and his associates and after one viewing

Fairbanks approved the release of the shortened version of the film to Byoir for the railroads. It was only when Mr. Fairbanks received a proposed brochure from Mackie, [fol. 91] representing the railroads, which brochure was intended to be sent out with the film, that he realized there might be possible distortion. His statement in a letter dated April 3, 1953 to Mr. Mackie makes that extremely clear:

> "However, we do not regard the film as an indictment of large or even heavy trucks *per se;* and certainly, it would be foreign to our purpose were the film in any way to become an instrument of partisan attack upon highway transportation or the trucking industry."

In addition, he suggested that the Bureau of Public Roads should not appear as the sponsor of the picture, if such use was intended to be made of it. Mackie thereupon agreed not to distribute it with the brochure and asked permission to exhibit the shortened version of the film already purchased by Byoir on behalf of the railroads. Since Mr. Fairbanks was honestly of the opinion at that time that the film did not distort the purpose and the results of the test he agreed that they might retain the copies and exhibit them.

As stated above, the long version of the film was exhibited on one of the trial days. On the next day the shortened version of the film was exhibited. The profound impact on the Court of the short film was that big trucks per se were the sole cause of damage to the highways. Important language which would have made clear the results of the test, particularly with respect to bad subgrade soil and pumping, were entirely eliminated. The impression left with the Court at the conclusion of the short film disagreed entirely with the sworn statements of Mr. Fairbanks regarding the results of the test. His statements agreed with those made in the long version of the film as previously set forth. That the distortion was intentional as well as effective is clearly evident from an overall reading of this record. Mr. Fairbanks viewed the exhibition of both films in the courtroom. On the basis of his sworn testimony the Court finds that Mr. Fairbanks was fooled by Byoir and [fol. 92] tricked into approving a distorted film. This par-

ticular episode in the Byoir-railroad antitruck campaign is a classic example of the "use" of public officials by the Byoir organization in furtherance of its campaign. Such was an everyday occurrence in the Byoir approach to public officials in this case, and I have particular reference to the above situation as well as the "use" of Governor Lausche and Messrs. Taft, Manning, Dimit and Schmidt; the latter two being referred to under "Pennsylvania Activities". On the other hand, any "use" of individuals such as Clinton Johnson, Menzie, Kauer, Cohen and "Cappy" Thompson (of Pennsylvania) was with their complete knowledge and for the purpose of advancing their own personal interests rather than those of the public that they represented. These and other instances will be referred to in more detail in other headings of this opinion. It is only fair to Mr. Fairbanks at this point to say that the Court considered him a fine, honorable and dedicated public servant, who in giving permission for the shortened version of the film never contemplated that it would be used for the very purpose which he decried in his letter of April 3, 1953 as "an instrument of partisan attack upon highway transportation or the trucking industry".

Needless to say, Byoir made full use of its publicity outlets to tell the world that big trucks crack roads. It was a complete distortion not only of the test but of Mr. Fairbanks' opinion that the road tested could carry gross weights without danger as high as 73,280 pounds (R. 3318).

On or about January 8 of 1951 there was distributed to the members of the Advisory Committee a proposed copy of the findings or in other words the tentative committee report of Road Test One—Maryland. Kauer's copy was in the hands of Byoir within a remarkably short time after its receipt by him despite the Advisory Board's decision that the data was not to be issued to the general public at that time. Byoir summarized the tentative findings and gave them to News Week, where they appeared [fol. 93] as completed studies, although the final report was not approved until May of 1951 and the printed copies not available until sometime after October of 1951 (R. 3322-3326). The results as given to News Week and printed in a box in that magazine completely distorted the purpose and

results of the test and attributed all road damage to big trucks, the position taken by Byoir from the outset and entirely false insofar as the objective findings of the test are concerned.

It might be well at this point to set out what the actual conclusions of the officials in charge of the test were as officially reported in Publication 227 of the National Research Council. There were 19 technical findings which are carefully set out in technical engineering language. Briefly stated with respect to the point under discussion in this case that big trucks break roads, they are as follows: (1) That where the road was built on granular soil very little damage occurred no matter what type of vehicle was used; (2) That where the test road was built on fine grain soil, there was no damage until the fine grain soil became permeated with water; (3) That in the presence of water, the subsoil was pumped from under the concrete slab through joints in the road; (4) That the degree of pumping was faster and the amount greater upon the application of the heavier vehicles; (5) That with the subsoil removed the concrete would and did crack, with the heavier vehicles doing the greater and quicker damage.

As publicized by Byoir, both in its releases and in the shortened version of the film, one conclusion was bound to be reached by the ordinary observer from the reading of the releases or viewing of the short film—that only big trucks did damage to the highways and that without regard to any other contributing factor.

Pennsylvania Activities.

As stated at the outset of this opinion, after 1943 the attempts of the trucking industry to increase axle loads and [fol. 94] gross weights in the legislative sessions of 1945 and 1947 failed. In the 1949 session the then Governor, James A. Duff, ordered the Chairman of the Legislative Committee on Highways not to send any bill to his desk increasing the said weights. With complete administrative support the railroads had no difficulty in controlling the restrictions on trucks and by legally acceptable means.

Pennsylvania had a lower gross weight than all of its surrounding states and the net result was that many of the

trucks could not legally carry through Pennsylvania loads which would be legal in other states. One incongruity of that situation was that at the western end of the state in shipments from steel mills only the first 60 miles of a trip to surrounding states of many hundreds of miles was off limits for a full load. Naturally it created a considerable problem for the truckers engaged in the long-haul steel industry. That the situation was favorable to the railroads was fully recognized and every attempt was made on behalf of the railroads to keep that weight limitation by statute, and of course for the express purpose of helping railroad revenues. Again, this was entirely proper. The situation was such that in 1949 Pennsylvania did not need the services of Byoir. William A. Reiter, Chairman of the Associated Railroads of Pennsylvania, had a good working team operating in Harrisburg. Joab K. Mahood, Secretary of the Grange, together with H. A. Thomson, better known as "Cappy" Thomson, Secretary of the Pennsylvania State Association of Township Supervisors, worked in close cooperation with Mr. Reiter. However, improper activities were also present. That the Pennsylvania Railroad used the Byoir third-party technique in creating ill will against the trucks when House Bill 560, The Big Truck Bill of 1949, was pending, is clear from two advertisements printed during the months of March and April of 1949. While it is true that one advertisement designated as 3P-5192 was put out under the Associated Railroads of Pennsylvania, two advertisements designated 3P-5205, "You Can't Satisfy A Road Hog", showing a big truck in the form of a hog at a [fol. 95] large trough marked House Bill 560, and 3P-5203, "Mr. Taxpayer and Motorist We've Had Enough . . . Haven't You?", were put out under the name of the Pennsylvania State Association of Township Supervisors, H. A. Thomson, Secretary. The advertisement 3P 5202, Road Hog, appeared in one hundred and thirty-five Pennsylvania newspapers, while advertisement 3P-5203, Mr. Taxpayer, was limited to the newspapers of the larger cities of Pennsylvania. The Pennsylvania State Association of Township Supervisors is created by statute. Public monies are appropriated for its support and it would be impossible for that association under statutory budgetary requirements to use public money to pay for advertisements of this sort.

Mr. Reiter's naive explanation was that Mr. Thomson wanted to run the advertisements and that he had Al Paul Lefton, P. R. R.'s advertising agency, prepare them for the association, had them inserted in the respective newspapers, and did not discuss the payment of the charges until sometime thereafter; then, out of the goodness of his heart and so as not to embarrass Mr. Thomson, he persuaded the railroad to pay the charges of preparing the ads and inserting them in the newspapers. That explanation the Court does not accept. To the contrary it finds that they were prepared with prior financial and academic approval of the same Mr. Reiter. These advertisements were in line with the Byoir technique designed to vilify the trucking industry as such.

It is apparent from the record made in this case that Mr. Mahood and Mr. Thomson were both members of Mr. Reiter's team in opposition to any increase in truck sizes or weights. They had worked together for a good many years and had worked well together. However, in 1951 after the introduction of The Big Truck Bill in May of that year in the Legislature, it became evident to all three that Senate Bill 615 had a good chance of passing and being signed by the Governor of the State, then the Honorable John S. Fine. At a dinner-meeting, paid for by Reiter, it was decided to call upon the services of a publicity agent to [fol. 96] help them in their campaign against the bill. Reiter went to Littlefield and as a result of that conference, the Carl Byoir organization was called upon to move into Pennsylvania in the fight against The Big Truck Bill. With almost three years of experience in this particular field behind it, Byoir through Colburn C. Hardy, assisted at times by Kiely, Marine and Stull, immediately started its third-party technique operations. It was not necessary in Pennsylvania to set up bogus organizations. As aforesaid, Reiter had working closely with him the Secretary of the Pennsylvania Society of Professional Engineers, the Pennsylvania Grange, and the Pennsylvania State Association of Township Supervisors. These three organizations, but principally the latter two, were the springboards for the publicity in Pennsylvania. The state was divided into sections: Stull in the western, Hardy in the central, and

Marine in the northeast. Every editor of every newspaper was contacted and personally wherever possible. The Byoir "kit", a composite of all statistical information created by Byoir, was made available to these editors. Release after release denouncing S. B. 615 was given to the newspapers. It was also at this time that it appeared Mr. Mahood would retire as Secretary of the Pennsylvania Grange to be succeeded by Dr. B. H. Dimit, who was retiring from the profession of teaching at one of the State Teachers Colleges. Investigation by Reiter, et al. showed that one of his close personal friends and associates was Robert K. Fisher, an attorney on retainer by the New York Central lines. Their first connection with Dr. Dimit was through Mr. Fisher, and through Fisher the Byoir "kit" was made available to Dimit. Dr. Dimit was an ideal associate to have join the team since the considered opinion of the "team" was that Dr. Dimit was a person who would be very glad to have someone else do his research for him. From that time Dr. Dimit was putty in the hands of Byoir. Completely unknown to him Byoir so manipulated him that no speech, letter, or news release was delivered, sent out, or released until it had been carefully edited by Byoir and in at least [fol. 97] one instance cleared with Mr. Littlefield of the Pennsylvania Railroad.

Hardy took up his quarters in the office of the Grange, used Grange stationery, and the bills for publicity were sent to the Pennsylvania Grange c/o Mr. Hardy. The caption of the bills clearly indicates that the printing houses and newspaper services regarded Hardy as a member of the Grange. Hardy also had an address attacking the bill made over a Lancaster Broadcasting System station under the name Pennsylvania State Association of Township Supervisors. Although the station must have known, since Byoir was billed for the broadcast, that it was made under the auspices of at least Byoir and not the association, nevertheless, and in violation of the Federal Communications Act, no mention was made at the conclusion of the broadcast that it was being paid for by an independent organization. This bill as well as the other bills above referred to were paid in the first instance by Byoir and all reimbursed by the ERPC.

The Trucking Bill had hard sledding due to this organized opposition. However, on the agenda of the Legislature was another bill that caused tremendous difficulty—The Pennsylvania Sales Tax Bill. Controversy over this kept the Legislature in session until the end of the year. Despite the terrific resistance created by Byoir and its third-party technique as well as the opposition of the railroads, the bill passed by a resounding majority of each House and was sent to the Governor. Exhibit P-53 contained in a memorandum of Reynolds Girdler, the account executive of ERPC, dated February 15, 1952, to John Stahr, summarized Byoir's accomplishments from Byoir's viewpoint in helping to bring about the ultimate veto of the bill. It is well worth repeating it at this point in toto:

To: John Stahr

From Reynolds Girdler February 15, 1952.

Nomination for December Award.

Achievement: Defeat of "Big Truck" Bill in Pennsylvania.

[fol. 98] The state of Pennsylvania has one of the lowest gross road limits for heavy trucks in the East. Specifically, Pennsylvania will not permit any truck on its highways which weighs more than 50,000 pounds with load, as compared with 73,000 pounds allowed by New York, New Jersey, and most other Eastern states.

This low maximum in Pennsylvania is very irksome to the heavy trucking industry because it keeps them from getting a large share of the very profitable steel hauling business between major cities in Pennsylvania and Ohio.

Consequently, the trucking industry started back in the middle of 1950 to lay the groundwork for a piece of legislation which would increase the Pennsylvania maximum from 50,000 to 60,000 pounds. The trucking industry bought an elaborate system of television and radio programs blanketing Pennsylvania. They went through the major cities of Pennsylvania and worked out promotional special trucking sections with all the important newspapers, thus giving each important newspaper very substantial and profitable ad-

vertising. In addition, the trucking industry smartly inveigled the Pennsylvania Railroad into a discussion of their agreeing on an increase in the allowable maximum, and the Pennsylvania Railroad very stupidly agreed not to oppose an increase up to 50,000 pounds. This agreement was thoroughly publicized throughout the political world of Pennsylvania.

The trucking industry went further. It got up a committee and $200,000 for the campaign for the Republican candidate for governor, and he was elected. The trucking industry also heavily subsidized various members of the Pennsylvania legislature during the November, 1950, election.

When January, 1951, opened there seemed every reason to believe that the truckers would get their bill through, increasing the allowable weight to 60,000 pounds.

The 17 railroads of Pennsylvania then started fighting —without our help. They fought the bill for four months, [fol. 99] and then threw up the sponge. They reported to their superiors that they were licked. Even so, the lobbyists in control of the railroad activity continued to oppose allowing the C. B. & A. people to operate in Pennsylvania.

Their superiors then thrust us down their throats.

The team went to work in Pennsylvania beginning in June, 1951. Not only did they begin to generate publicity against the bill, but they were successful in getting a long list of organizations and individuals publicly to oppose the bill. Those organizations ranged from the CIO to the Pennsylvania State Grange. The individuals ranged from a "crusading coroner" of Pittsburgh to John L. Lewis. The clamor against the bill grew and grew. Even so, the Republican majority in the Pennsylvania Legislature was so thoroughly committed to the trucking industry that the bill finally went through both the lower and upper houses. However, so violent was the fight that it kept the Pennsylvania legislators in session for nine months—a record in Pennsylvania.

Even after the bill was passed by both houses, the clamor against the bill continued. Day by day went by without the Governor's signing the bill. Finally, he announced that the opposition was so great that he would

have to hold a public hearing. He scheduled the public hearing to be held in his own chambers.

The C. B. & A. team thereupon went out and organized 21 witnesses for 21 organizations against the bill. They prepared their statements and the publicity together with it.

The public hearing was one of the biggest news events in Pennsylvania. Major Pennsylvania newspapers placed the eight-column streamers front page, over national and international news involving Truman and Churchill. Six minutes before the bill automatically would become law in the absence of a Governor veto, Governor Fine vetoed the bill.

The repercussions on the trucking industry were nation-wide, and embittered comments went into newspapers all [fol. 100] over the country. In Ohio the truckers were so stupid as to state publicly that "All the ATA money didn't do (them) any good." They went on to say that they thought they had the bill bought.

Veto of this bill meant that some $5,000,000 worth of freight was retained on the Pennsylvania Railroad, because the trucking limit was not raised.

This represented one of the most dramatic illustrations of the power of organized public opinion that anybody could hope to find. While the award must go to Colburn Hardy as head of the team, he must share the award with Lyon, Stull, Marine and Kiely, because it was a team job.

I attach as evidence copy of the letter written by the top railroad lobbyist, who originally fought hardest to keep us from being allowed to operate in Pennsylvania. I don't think anybody in the history of Byoir ever received a more impressive tribute.

Reynolds Girdler

RG/et
Enc.

While the record in this case clearly discloses that some of the statements constituted "puffing", Hardy himself admitted on cross-examination that the veto was his greatest accomplishment in the public relations field up until that time and that it constituted "his finest hour". However, the record and the Governor's veto message also

clearly indicate that Byoir was extremely effective and that its organized opposition had much to do with the Governor's veto. And how was that accomplished over and above the use of the third-party technique?

To begin with Pennsylvania was one of the constituent states of the Maryland Road Test. The Governor's veto, P-282, was dated January 21, 1952. It will be recalled that the first tentative draft of the Maryland Road Test Report was to have been issued on January 15th of 1951. Byoir had obtained advance copies and had publicized the railroad theory that big trucks alone break roads. The final draft [fok 101] was not printed and distributed until 1952. The State Highway Department of Pennsylvania through the Secretary of Highways was against the bill. One of the reasons that the Chief Engineer was against the bill and urged the Governor to veto it was based upon statistics drafted by his own department. An objective analysis of the statistics presented, however, finds that they came in the first instance from the desk space organization created by Byoir in New York, the Empire State Transport League. In the second place one Mr. Marine, the same Mr. Marine of Byoir, a statistician of great merit in presenting trucking statistics in such a way as to damn the trucking industry, was the chief source to Mr. Van Riper, Assistant Chief Engineer of the Pennsylvania Highway Department, of the trucking statistics upon which Mr. Schmidt, then secretary, relied in urging the veto to Governor Fine. It will be seen that there was here, as there was in the United States Bureau of Public Roads, considerably less than complete objectivity in the presentation of facts to public officials, upon which facts public officials were urged and did exercise executive judgment favorable to the railroads and injurious to the truckers.

In addition to the above, Byoir, at the request of Reiter, wrote speeches for legislators in opposition to the bill. Hardy also prepared all of the press releases of Dimit and Thomson when they appeared at the Governor's open public hearing on the bill. These releases, skillfully drawn, stressed those elements chosen by Byoir and the railroads for particular attack.

There is no doubt that Dr. Dimit admitted on the stand that he had, without his knowledge, been "used" by the Byoir organization. The effect of the testimony of "Cappy" Thomson on cross-examination, even though he attempted to vehemently deny the fact, was that he too had been "used" by the Byoir organization. From his appearance, manner and testimony, the Court was persuaded that Mr. [fol. 102] Thomson knew he was being used by the Byoir organization and was perfectly happy in that status.

Having successfully repulsed the truckers in their efforts to clear Pennsylvania as a bridge state, for the next year and up until the institution of this suit the record is abundantly clear that Byoir worked hand-in-hand with Littlefield and with Reiter to promote the introduction and passage of a weight-distance tax, using exactly the same methods that had been used in the other states of the program. While there is no direct testimony on that subject, it is the opinion of the Court that it was the institution of the present suit which prevented further action along that particular line of attack. However, up to a few days before the institution of this suit, extensive plans were being made for Byoir to again enter Pennsylvania and to push its campaign with the utmost vigor and backed by whatever funds were necessary. It may be remarked at this point that neither Byoir nor the railroads were ever short on funds in this campaign.

Campaign of Vilification.

The whole tenor of the antitruck campaign, originated by the railroads in the thirties, abandoned during the war, and thereafter reactivated in 1946, was based upon the use of third parties to "front" for the railroads. As noted, in New Jersey, the New Jersey Automobile Owners, Inc. and the New Jersey Tax Study Foundation were two shining examples. In New York, the Citizens Tax League and the Empire State Transport League are two further examples. In Ohio, Save Our Highways Clubs were used.

In Pennsylvania, the good offices of the State Grange and the State Association of Township Supervisors were exploited. The above examples are quoted to demonstrate that Byoir merely accentuated and accelerated the campaign

of the railroads by forming bogus front organizations and perfecting the use of existing ones. The base of the pyra- [fol. 103] mid of accomplishment on the part of Byoir for the railroads was the arousing of resentment in the ordinary citizen against the trucks. To this end Byoir shrewdly chose the obvious shortcomings of the trucking industry and by use of dramatic segments of truth distorted them into complete falsehoods. While Byoir chose the appellation of "third-party technique" for its activities, I prefer to treat the whole procedure in its true light, which is the technique of the "Big Lie".

How was public resentment aroused during the period 1949 to 1952? Byoir as early as 1949 had started a collection of photographs of sensational truck accidents. Immediately upon the happening of such an accident, no matter in what part of the country, Byoir would find some person not averse to publicity to issue a news release and use the picture as representative of usual day-by-day traffic events rather than the unusual, which it was. In some few instances trucks carrying weight far beyond the loaded capacity of a bridge would attempt to cross, would fall through and actually destroy the bridge. While these were few in number, Byoir saw to it that these few were so publicized as to create the impression that it was a matter of great frequency, if not of daily occurrence. Byoir also highlighted the obvious shortcomings of the truck, which were slow speeds on steep mountainous grades causing traffic tie-ups; the racing of the truck down the opposite grade thereby preventing the unblocking of the tie-ups; the obstruction of the vision of the motorists following large trucks; the "gunning" of the motors of the trucks in residential areas, and other actions of some drivers in order to bring all truck drivers into disrepute. The breaking down of secondary and country roads by the use of large trucks was highlighted pictorially throughout the country and to the point where the casual motorist was convinced that a tremendous percentage of our secondary roads were being broken down and absolutely destroyed [fol. 104] by heavy trucks as pictorially represented. While it is true that on occasion some venal truckers did use back roads to escape weighing stations on main roads, in a vast

majority of the instances, represented as typical, the damages resulted from detouring by State Officials of heavy trucks over roads not capable of carrying the weight and solely for the purpose of making repairs on main highways fully capable of bearing or carrying the weight of the trucks in question. All of these publicity releases, pictures, etc. were furnished by Byoir to all the civic organizations previously mentioned. In addition, and ostensibly as an independent news source, Byoir utilized wholly owned subsidiary corporations which made newspaper mats of a group of pictures which were distributed at nominal cost to thousands of newspapers throughout the country. These newspapers were primarily in the smaller communities and, of course, they could not afford that type of photographic coverage. And what were these photographs so furnished?

Reproductions of a few typical instances were exhibited at the trial: From Byoir's Central States News View in Chicago came sex, sports and a truck breaking up a road. First, a picture of a plunging neckline; next a picture of the new Notre Dame basketball coach (side by side at the top of the mat). On the bottom half of the mat was a truck "bogged down" breaking up a road.

Again, another Central States News Views showed at the top of the mat Joe Lewis, Jr., 2½, being given a boxing lesson by his famous father, retired heavyweight champion at that time. Next, "Miss Continuous Towel of 1949", a shapely model honored by linen-supply industry. In the lower half of the picture was a truck and a broken up highway caused by heavy trucks on detour.

Finally, People, Sports In The News, a New York subsidiary of Byoir sent out for immediate release, exclusive in a particular city, a 2 column, 13 EM mat, showing royalty, sports and trucks. The top of the mat on one side showed [fol. 105] the then Queen Elizabeth of England on her 50th birthday. On the other top side is shown a recalcitrant race horse in the starting gate at Detroit's Hazel Park track. Finally at the bottom of the mat appears a picture of the Maryland Road Test showing engineers measuring deflections at a joint and termed in the mat picture "Crackathon" —"Scientific tests to measure road damage inflicted by heavy trucks are under way on this mile-stretch of highway

in Maryland sponsored by 11 states alarmed over road deterioration". In the light of what has been said before about the Maryland Road Test this amounts to almost complete distortion.

Another very effective method of inflaming a large segment of the public which always has been influential in the formation of public opinion was to put on the Byoir payroll for purely propaganda purposes Mrs. Bessie Q. Mott, Vice-Chairman of the New York State Federation of Women's Clubs and Chairman of the Public Affairs Department of that same group. Mrs. Mott, described as "a typical American clubwoman", made quite a profitable career out of being the typical American clubwoman. In addition to receiving a sum substantially in excess of $13,000 (reimbursed by ERPC) over a relatively short period of time, she was successful in infiltrating into the programs of most of the important women's groups in New York and New Jersey, programs arranged by Byoir, which included speakers furnished by Byoir, for the purpose of arousing resentment against the truckers. It was necessary to make Mrs. Mott an expert in that field so Byoir made her an author. Byoir wrote a pamphlet entitled, "ARE WE BEING RAILROADED INTO SOCIALISM?" "A Survey of what's wrong with national transportation policy and how it affects each of us." A foreword was written by Charles L. Bergmann, Chairman of the Railroad Securities Committee, Investment Bankers Association of America. This brochure contained all of the favorable aspects of the railroad story and damned the truckers. While no witness of Byoir at [fol. 106] the trial definitely would concede that the entire publication was Byoir's handiwork, and not Mrs. Mott's, the purported author, there is no doubt in the mind of the Court that Byoir conceived and executed the entire transaction. Mrs. Mott was not new in the propaganda field. Byoir had occasion in the past to use her expensive services in the same field of propaganda in the A & P situation, which will be discussed *infra*.

By the use of these various media of arousing public resentment, including newspapers, magazines, radio broadcasts and television, Byoir in the area of its operation built a strong base of public resentment. During this period

they created so great public resentment against the trucks that it was then a relatively simple problem for Byoir in the public relations field to sell their "poison" against the truckers, and by the use of already existing organizations friendly to the railroad story, and by reactivating and setting up other organizations, as already noted, to convince people and legislators that everything the trucks did was wrong and that any restriction suggested should be placed upon them.

The cap of the pyramid, of course, was the projected legislation and the cap of the pyramid differed in each state. In New Jersey it was increased license fees lowering of weights. In New York it was the weight-distance tax. In Ohio it was first a substantial increase in license fees and next the campaign for the weight-distance tax. In Pennsylvania it was the veto by Governor Fine of the so-called Big Truck Bill to be immediately followed by a campaign for the weight-distance tax.

Counsel for all defendants have argued strenuously that since everything done was geared to ultimate legislation, then anything done to accomplish that end was within the protection of the 1st Amendment to the Constitution of the United States and without the orbit of the Sherman and Clayton Antitrust statutes. But this was more than merely an attempt to obtain legislation. *It was the purpose* [fol. 107] *and intent* of Messrs. Deegan, Littlefield and Mackie on the one side, and Byoir on the other, *to hurt the truckers in every way possible even though they secured no legislation; it was their purpose to restrict the activities of the truckers* in the long-haul industry *to the greatest extent possible*, and finally, if possible, *to drive them out of that segment of the entire transportation industry*. This feature of the action, which must always be carried in mind and represents the considered finding of the Court in this case, will be discussed at greater length in the legal discussion to follow. However, this particular section of the opinion is of great importance in the overall consideration of the case since it constitutes the original basis of activity of Byoir and the railroads against the trucking industry.

The Counterclaims.

A review of the evidence presented in this case by which the defendants attempted to establish a conspiracy on the part of the truckers to monopolize the long-haul transportation industry in the northeastern part of the United States reveals consistent and persistent activities on the part of the truckers which in many respects parallel the activities of the railroads in the field. It is the contention of the railroads on the basis of that testimony that if, in the opinion of the Court, an illegal conspiracy on the part of the truckers has not been established, the evidence of the truckers' activities as presented in the defendants' testimony shows a course of conduct which justified every activity of the railroads as reasonable competition in a free enterprise competitive system.

There is no doubt that between 1936 and 1954 there was a marked increase in the use of heavy trucks in the northeastern section of the United States and in the distances traveled by said trucks. While railroad revenues increased to some extent, the percentage increase did not approach the percentage increase of the revenues of the [fol. 108] heavy trucks. Although in the northeastern part of the United States and in the country as a whole the percentage of the total production transported by railroad increased moderately, that of the trucks increased very appreciably. When it is considered that trucks receive about 6¢ for each ton mile carried by them, where the railroads receive 1.4¢ per each ton mile, the disparity in cost to shippers will appear in a more vivid background. The truckers contend that their fast services and flexibility, despite their higher charges have been the principal factors in the increase of their business. The railroads insist that public subsidy in the building of roads is the answer.

There is no doubt that since 1943 PMTA has actively sought to attain legislative objectives through a broad-scale public relations program. Actually since 1941 it has employed public relations personnel which later developed into a public relations department under the guidance of a competent public relations director. Part of plaintiffs' program was to establish close liaison with members of the Pennsylvania Legislature in order to achieve PMTA's

objectives. It encouraged its members to take an active part in party politics to aid in obtaining or defeating legislation. Originally most of its activities were directed at the county level and political contributions were sought and delivered to the respective parties at that level. There is no doubt that PMTA was at all times through its officers, committees and public relations director, fully aware of the continuing railroad campaign, particularly in Pennsylvania, to convince the public that the heavy truckers did not pay their proportionate share for road building and road maintenance. The contentions of the railroads throughout this case was that the truckers have enjoyed the aforementioned public subsidy. The railroad campaign through newspapers, magazines and speeches since the 1930's has been directed at "educating" the public that the railroads paid taxes on everything that they used in the transportation of freight and passengers including stations, freight [fol. 109] yards, etc. Parenthetically it may be here remarked that the railroads enjoy under the laws of Pennsylvania certain advantages not accorded truckers, such as, rights-of-condemnation and freedom from local taxation on rights-of-way; it is also a matter of common knowledge that railroads in earlier years received many subsidies at the hands of the public through the State and National Legislatures in the form of land grants and otherwise. It should also be observed at this point that initially roads were not built for trucks. They were and still are important in our scheme of national development, national safety and security, as well as benefiting the driving public. Roads were already in existence when the trucking industry was born. It may also be remarked that there has never been a declared national policy or a state policy as advocated by the highway users association based on the recommendations contained in the Atterbury-Swayne Report. That report, it will be remembered, recommended that all costs for the construction of highways, over and above that necessary to carry the weight of the passenger car and the small pickup truck, should be assessed against the heavier vehicles which made use of the roads by assessment against them of user taxes. However, the matter of weight and sizes, as aforesaid, was left to the respective states, primarily at the

insistence of the railroads. And up to 1955 upon the passage of the latest truck bill in Pennsylvania, the railroads were completely successful in Pennsylvania in eliminating a considerable amount of truck competition. It must also be borne in mind at this time that the railroads had interpreted the National Transportation Policy of the Congress of the United States to their own advantage, i.e., airlines for speed; trucks for short-haul, and railroads for long-haul. As interpreted, this has never been and is not now the National Transportation Policy. It must also be borne in mind that the counterclaims are based on events that occurred in Pennsylvania. The record is bare of any activities on the part of the truckers in any of the other [fol. 110] states resisting the railroad activities. Apparently the truckers of Pennsylvania were the only ones who actively resisted and did something about the railroad-Byoir campaign.

With the above factors in mind, it will be seen that through the decade of 1940 to 1950 there was a distinct clash between the railroads and the truckers in the State of Pennsylvania over any legislation which would be favorable to the truckers. That the truckers and PMTA attempted to do everything possible to attain their legislative objectives and aims is amply established by this record. While the defendants in this case attempted to label the legislative efforts as an attempt to divert business from the counterclaimants, it was actually an attempt by the truckers to obtain legislative approval to enter into competition with the defendants and counterclaimants in a field in which up to that time by legislative action they had a complete monopoly. The record establishes that the truckers wrote to and made personal contacts with legislators in support of bills increasing the weight of trucks; that they had representatives of other industries write and make personal contacts with legislators in Harrisburg without disclosing trucker connections; and that they had such persons intentionally refrain from advising the legislators and the said officials that the letters and contacts had been solicited; that they solicited from legislators statements in support of their position and had news releases issued thereon. There is no doubt also that in every way possible the

truckers tried to eliminate the opposition to its legislative program of the Pennsylvania State Grange and the Pennsylvania State Association of Township Supervisors, and even the railroads. The latter was a suggestion that shippers route through other lines rather than the Pennsylvania Railroad. It is clear, however, that the suggestion from the truckers was made in order to weaken P. R. R. objections to the Big Truck Bill and was not designed to drive the P. R. R. from the transportation field.

[fol. 111] About the middle of the decade PMTA had a tax manual prepared charging that the railroads of Pennsylvania themselves did not pay their fair share of taxes as compared with other states and made a wide distribution of it to legislators, banks, security investment houses, etc. That this action was directed against the railroads running through Pennsylvania is entirely clear. However, the truckers had been the target of a strong campaign directed to the public with the purpose of convincing the public that trucks did not pay their fair share of taxes. In such a competitive situation it is well within reasonable limits of competitive practice that the truckers, if they could do so, be permitted to likewise show the public that their competitors, the railroads, were actually guilty of the fault charged against the truckers. Further, this material was sent out with attribution to the PMTA, something the defendants never did in this campaign.

During this time it became evident to the leaders of PMTA that there was a need for a change in legislative approach and general public relations. In fact, it was decided that contributions from the truckers for political purposes should be centralized. Instead of making contributions at the county level, the knowledge of which would be known only casually by the respective leaders of the Republican and Democratic parties of Pennsylvania, it was determined to make a substantial contribution at the state level directly to the State Political Chairman of each party. Accordingly, depending upon political affiliation, all truckers were solicited for political contributions to the party of their respective choice. The combined totals were taken to Harrisburg and delivered to the chairmen of the respective parties. In total, they represented sizable con-

tributions, in one year approximating $40,000 to each political party. The Court considers this practice a rather sad commentary on the way political campaigns are financed in this state and makes no attempt to condone it. It is, nevertheless, a fact of political history in Pennsylvania.

[fol. 112] A firm of consultants, Wilder & Associates, was also employed to make a study of the activities in the public relations field of PMTA, express an opinion thereon, and make recommendations for a change of policy. This completely objective study, completed and published in December of 1949, showed clearly the attitude of the public toward the truckers as to the areas in which they were deficient and made recommendations looking to the elimination of such deficiencies. It is most impressive to the Court, sitting as a jury in this case, that no part of this 81 page report is critical of the railroads or any suggestion made that the truckers might obtain further business at the expense of the railroads; and certainly there was no suggestion of any conspiracy to attain such ends. The report is extremely critical of certain faults of a segment of the trucking industry as such. It shows that the acute problem (as related to public opinion) of road hogging, double parking in congested areas, creeping uphill and speeding down, and noise and vibration in residential areas, had pyramided through repeated application of each unfavorable stimulus occasioned by a small segment of trucks and had resulted in associating in the public mind these particular trucks with all trucks. Again, parenthetically, it may be remarked that that unfavorable association of the small segment with all trucks had always been skillfully nurtured by the railroads and had been brought to fruition by Byoir.

The PMTA then expanded its public relations department and attempted to do a straight selling job to the public and to the legislature based upon what it considered the real merits of its case. It will be recalled that it was just at this time that Byoir began its national campaign, as above described under Vilification Campaign, and the full impact of this campaign was not realized by PMTA or those in charge of its several committees. The trucking industry had supported a great number of successful candidates for the state legislature, both Senate and the House of Repre-

sentatives, and looked forward to favorable action in 1951. [fol. 113] As aforesaid, with the opposition of the administration of the outgoing Governor Duff, they had realized that under his administration there was no possibility of favorable action upon their legislative aims. It has been alleged and established to the satisfaction of the Court that in the gubernatorial campaign of 1950 the truckers had in large measure supported the candidacy of many members of the legislature who in that year were elected to office. The railroads had definitely opposed and the truckers supported candidates known to be favorable to their (truckers) point of view. While several of the candidates who had voted in favor of the truckers were defeated through railroad opposition, there were many others elected with the support of the truckers. Ironically, one of the defeated candidates in a later year, because of railroad opposition, was Samuel B. Dennison, a representative at the sessions from 1941 to 1951, who, from 1947 to 1951, had been Chairman of the House Motor Vehicle Committee. He later appeared at Harrisburg as Legislative Consultant to the truckers.

As stated above, under Pennsylvania activities, the Big Truck Bill was passed with a resounding majority in both Houses. Eventually the Bill was vetoed by the Governor as above outlined. Defendants contend strongly that PMTA in arranging for support of the Bill was guilty of such unfair concerted action against them as to amount to substantial evidence of conspiracy on the part of the trucking industry to drive the railroads out of business. The fallacy of that reasoning lies in the fact that the truckers were striving to accomplish an end in support of their own industry in order to allow that industry to compete with the railroads, and everything done in this connection was well within the limits of fair competition in private enterprise. There is not nearly sufficient evidence to convince the Court sitting as a jury in this case that the truckers intended by this action anything other than self-help, and any action taken was not calculated to destroy the railroads [fol. 114] but merely to obtain an opportunity to compete for the business with the railroads in a field theretofore denied them by statute.

With the veto of the Big Truck Bill in 1951 a change did come over the truckers in their attitude towards the railroads. All of the governing officials of PMTA were intellectually certain that the undercover attacks of the previous three years which had held the trucking industry up to scorn and the distorted views fed the public as to the results of the Maryland Road Test had been railroad inspired. But up to then they had no legal proof. So incensed were the truckers that it was decided in February of 1952 to investigate the possibility of a suit against the railroads. To quote the President of Noerr Motor Freight, Inc.: "We were trying to find out who was stabbing us in the back." Asked "What did they have to do with this suit?" Answer, "Well, if we found out who was stabbing us in the back, we were authorized to institute suit to pull out the dagger." With that thought in mind it was determined to employ a public relations firm to make a complete investigation of the whole transaction. The testimony of Mr. David B. Charnay, President of Allied Public Relations Associates, Inc., a New York public relations firm retained by PMTA in April of 1952, as to the purpose of its retainer, and which testimony is believed by the Court, is as follows:

Mr. Kohn.

"Q. You said you did not personally seek legislation as a lobbyist. One of the things you did not do in that situation was that you did not personally contact legislators."

Mr. Charnay.

"A. Let me make it clear. If I were able to get legislation, I certainly would try to get it for them. We were not hired for that. We were retained for one specific purpose, and that was to balance the scales between the railroads and truckers. The railroads were [fol. 115] having a field day; we were retained for one specific purpose, and that was to balance the scales between the railroad and truckers. The railroads were having a field day; they were wiping the floor with the truckers, and the truckers were not fighting back. The truckers would turn the other cheek every time the railroads smeared them. It was all in the press and

everywhere. The truckers did not try and answer back. Our job was to counteract that. There were others in the Pennsylvania Motor Truck Association who were working possibly directly on legislation for the truckers."

The record amply sustains the finding that Charnay and Allied immediately began to attack, by publicity releases, the Maryland Road Test; complained of an improper relation between the Bureau of Public Roads and the railroads; charged that public officials in connection with that test used railroad money, citing Messrs. Johnson and Cohen, to corrupt public information relative to the subject matter of the Maryland Test film; and made other and serious charges intimating that these same public officials might possibly have been the subject of corruption and bribery by the railroads. At this point the Court will indicate its finding on the question of bribery of both public officials and the officials of independent organizations. The record indicates beyond peradventure of doubt that Eyoir using railroad money worked in close liaison with public officials, lavishly entertained them at the expense of the railroads, and used them as dupes in the railroad campaign against the truckers. However, the Court feels that no inference should be drawn from the testimony that such bribery and corruption actually occurred in that these charges are not supported by a sufficient weight of the evidence to justify such a finding. On the other hand, it is perfectly clear to the Court that these same persons were working to further the railroads' point of view because of their own personal interests and to the detriment of the [fol. 116] public they were purportedly representing. In that light and on the basis of the information then in the hands of the truckers it is entirely reasonable that they suspected such an illegal association and that they would ask responsible government officials to investigate to determine whether or not there was such a connection. It would seem in the then state of their knowledge to be an entirely common-sense request. The defendants have asked the Court to find that all of these allegations on the part of the truckers were false and were made for the purpose of

destroying the railroads' position in the transportation industry. Nothing could be farther from the real fact. The actions were taken to protect themselves from serious and unwarranted in fact attacks. They charged that the edited film inaccurately put the trucking industry in an odious light, which it did. They charged that the United States Government, through the Bureau's sponsorship of the edited film, was devastatingly and inaccurately critical of the trucking industry, which it was. They charged also that on April 13, 1953 it was the purpose of the railroad industry to distribute a pamphlet in connection with accomplishing the same sinister purpose, which at that time it was. While the charge that the tentative findings of the Highway Research Board were fraud from beginning to end, originated by paid railroad agents using railroad money, is not supported by the evidence, the interpretation as distorted by Byoir and released to the public as the official findings did constitute a fraud upon the public and even constituted a fraud on the Chief Executive of the Commonwealth of Pennsylvania, through the Secretary of the Highway Department. The Court also finds as a fact that a deliberate distortion of a fine scientific achievement, Maryland Road Test—One, was used as one of the instruments in the campaign of the railroads to either severely limit or destroy the heavy trucking industry.

Charnay's investigation of the Byoir activities (one public relations firm investigating another) convinced the [fol. 117] truckers of something they had suspected from the outset—that the railroads and railroad money were behind the continuous attacks upon the trucking industry. Charnay also attempted in a limited degree to use the Byoir technique of phony organizations. He set about to form a completely fictitious organization to be known as the Pennsylvania Motor Safety League. While its purpose was ostensibly to help the trucking industry, its ultimate purpose was to attack the railroads. Fortunately in this case wiser heads within the organization of the PMTA and wiser counsel prevented the formation of such an organization and its utilization by the truckers in a campaign against the railroads.

It is also worthy of note at this point that although the truckers sought out and made a collection of all railroad accidents and were in a position to magnify them in a campaign against the railroads, they were never used, but were merely held in reserve for defensive use should the railroads again start their publicity barrage about truck accidents. Also in 1952 the truckers implemented the tax manual of the mid-forties and had printed an entirely new brochure indicating to municipalities that the railroads were not paying their fair share of taxes in the State of Pennsylvania, contrary to a decision of the Supreme Court of Pennsylvania, and pointing up the fact that notwithstanding such decision, no action had been taken by the public officials concerned to revoke charters. This was a frontal attack upon the railroads and over 10,000 copies of this manual were distributed urging the taxation of railroads. However, there was no attempt to conceal its origin and its purpose was to counteract the propaganda of the railroads that the truckers were receiving enormous subsidies at the expense of the taxpayers. The Court, sitting as a jury, finds as a fact that there was no purpose or intention in putting out this tax manual to destroy the railroads in the long-haul industry, but the action taken was purely defensive of the three year old campaign of the railroads against the truckers and comes within the rule [fol. 118] of reason in free competitive enterprise. That the truckers spent great sums of money in support of their public relations program by subscription of members and others in support of the trucking industry is amply established by the evidence in this case. That PMTA sought out and received a grant of $100,000 from the American Trucking Association to assist in its campaign and to underwrite the expenses of this lawsuit is also amply established by the evidence in this case. It is also clear to the Court from what happened during the preliminaries of this case, prior to the trial, that the establishment of the plaintiffs' case depended in large measure upon the Sonya Saroyan papers turned over to the American Trucking Association by a former employee of Byoir.

It is also clear, as stated in a previous memorandum opinion, that these papers enabled the truckers to establish

what they had long suspected—concert of action on the part of the railroads in a deliberate attempt to keep the truckers from a large segment of the long-haul industry or, if possible, to destroy their effectiveness in this particular field and eliminate them as competitors. It follows therefore, from what has been said above, that the truckers with the one exception above noted, in every instance acted only in support of their own industry, and without any intent to restrain commerce.

Among the complaints made by the defendants against the plaintiffs is that they engaged an emeritus professor of engineering of the University of Michigan, one Dr. John S. Worley, who, although a consultant engaged and paid for by PMTA, was held out to the public as an independent highway engineering expert. The purpose of his employment was to testify at the expense of PMTA and without attribution *in favor of* the Big Truck Bill. It will be noted that here again is emphasized the difference in approach to their respective problems by the two competing industries. Dr. Worley was not engaged to injure the railroads but to help the truckers. It is certainly within the rule of rea-
[fol. 119] son in competing industries that either one may engage outside help and seek allies to further their own respective aims, provided however, that such friends and allies are not used in a conspiracy to destroy the competitor. A concert of action which has for its purpose the crippling of competition in a particular field and if possible of effectively destroying that competition is prohibited by the Sherman and Clayton Antitrust statutes. The Court sees no violation of the statutes in the Worley episode.

Another charge of the railroads against the truckers which should be disposed of at this point is that the present action, its pleadings, depositions, and even the testimony taken at the trial have been used by Charnay as a vehicle of publicity for the sole purpose of bringing the truckers' story to the public. As a corollary thereof, the railroads charged that this action constitutes virtually malicious abuse of legal process. The railroads also point out that this suit was financed wholly from a public relations program fund as indicative of the fact that the suit was purely for publicity purposes. This contention does

not impress the Court. The result of the action clearly indicates that the plaintiffs herein had a valid cause of action which was brought in good faith and on sound factual and legal grounds. Naturally, in a case of great magnitude, it could be expected that the expenses of litigation would be rather large. How the plaintiffs individually and in concert raised the money to support the litigation is of no concern to the Court. That they chose to finance it out of the public relations fund is also unimportant. As to the charge that the pleadings and depositions, and even the testimony taken at the trial, were commented upon and in the public press by the plaintiffs or their agents is likewise of no concern to the Court. This Court has no intention of restraining the use of public documents or interfering with the right of the press or individuals to comment upon events which happen publicly in a court [fol. 120] of law, provided such use is not part of an illegal conspiracy in restraint of trade or commerce.

It was a matter of first impression with the Court upon the original reading of the complaint when this suit was instituted some four and one-half years ago that the charges made were of a rather incredible nature and that the plaintiffs herein would have a most difficult task to establish their contentions by a fair preponderance of the evidence. It is now apparent that with the exception of proving by a preponderance of the evidence actual bribery of public officials and bribery of officers of public organizations, the plaintiffs have proved by a great preponderance of the evidence that a conspiracy in violation of the Sherman and Clayton Antitrust Acts actually existed; its formation, its purpose, and the means by which it was effected; and generally in the form and manner as alleged in the complaint.

Defendants as part of their counterclaim attempted to introduce certain evidence with respect to the highway systems in the northeastern part of the United States; the effect of the use of heavy trucks thereon; the increasing cost of construction, including changes of geometric designs to meet the requirements of heavy traffic; and other evidence with respect to the economic phases of the trucking industry, all of which will be referred to briefly herein-

after. All of this testimony was excluded by the Trial Judge as being either cumulative or not relevant to the issues in the case. From what has been said before and after a review of the evidence, it is clear that the counterclaims filed are without merit and, therefore, will be dismissed.

Summary.

The review of the record in this case, developed in practically continuous trial from October 1, 1956, to January 28, 1957, covering well in excess of 6,000 pages of record with [fol. 121] some 968 exhibits, nearly all of which were offered and received in evidence, has of necessity been extremely time consuming. It is impossible in this opinion to advert specifically to every detail of the testimony of the many witnesses or the content of the exhibits. From a consideration of the record as made in this court, together with the exhibits, the Court has stated the facts and conclusions which it deems necessary to a decision. However, the Court has examined carefully on more than one occasion the entire record and has given consideration to all of the testimony, the exhibits, the briefs and arguments of counsel thereon as well.

Without in any wise limiting the findings of fact contained in the above narrative description of the facts adduced in this case and the Court's comment thereon, a useful purpose may be served at this point in reviewing in summary form the findings of the Court in this case as a preliminary to a discussion of the law of the case and the application of the law to the facts as found.

The Court has found as a fact that the railroads and Byoir entered into a conspiracy in unreasonable restraint of trade, the nature and purpose of which was to injure the truckers in their competitive position in the long-haul freight industry in the northeastern section of the United States. This, of course, involves interstate commerce. The immediate purpose was to create public resentment to the truckers, not only in the minds of the general public but in the minds of those who utilized the services of the trucks and in such a manner as to interfere with business relations between shippers and truckers. There is no doubt that the

railroads prior to the development of the long-haul truck industry had an actual monopoly of that field. A new industry in competition had appeared. That industry by reason of more flexibility and faster service had made great inroads in that particular competitive field and its business had increased a thousand fold. Both were regulated industries. The truckers could not operate without a certificate [fol. 122] from the Interstate Commerce Commission showing the need for the service in a particular locality. While it is true that "contract carriers" as distinguished from "common carriers" might be utilized by an individual shipper (and these carriers form a large part of railroad competition), most of these carriers are likewise regulated by the Interstate Commerce Commission and only in the case of carriers of agricultural products is there any exemption from regulation. Common carriers, of course, are in the same status as railroads. Goods offered has to be transported at published rates. There is further no doubt that at this time there was "erosion" in great measure of previous railroad business to the truckers. That such erosion would "injure" the railroads in their revenues is likewise clear. That injury, however, is not a legal injury. It is merely a diminution of revenue because of a better competitive method of transportation evolved by the trucking industry. That the railroads recognized the problem and knew the underlying factors causing their loss of revenue is abundantly clear from this record. The railroads knew, despite the higher charges of the truckers, 6¢ per mile as against 1.4¢ per mile, that the truckers were rapidly gaining business because of extreme flexibility. They knew also that even without a show of necessity on their part before the Interstate Commerce Commission they (railroads) could be licensed to establish equally flexible truck routes. (See the opinion of Mr. Justice Reed in *I. C. C.* v. *Parker*, 326 U. S. 60 (1945), and dissenting opinion of Douglas, J. re the effect of majority decision.) Instead of meeting the competition in the field and giving the shippers what the shippers wanted, they determined upon another course of action—to injure and/or destroy the truckers and thereby force the shippers to their detriment to continue to use the railroads. This, of course, would be to the shippers' disad-

vantage in this great area of flexibility which was clearly so vital to the shipper but would eliminate the fundamental cause of the railroads' loss of revenue. It was with this very [fol. 123] thought in mind that the combination of Byoir and the railroads occurred in August of 1949 and a definite program for accomplishing this desired result was instituted with the full knowledge and consent both of Byoir and every defendant railroad. [Briefly restated, the plan was first to create hostility to the truckers.] With that as a base the rest of the plan evolved. This plan generally had 10 fundamental objectives:

(1) To seek out or create "independent" organizations favorable to the railroads' point of view and opposed to the truckers.

(2) Through Byoir and the ostensible independent organizations create a hostile public using the method detailed under the heading, "Campaign of Vilification".

(3) Through the organizations and at the instigation of Byoir create a demand for more tax revenues by government at all levels, particularly the local level.

(4) Through Byoir and railroad contacts have one of these organizations hire a recognized and ostensibly impartial statistical group to make a study of revenue-producing methods most palatable to the public; the statistical group would be supplied by Byoir with the questions to be asked the public and the answers to these questions would form the basis for the conclusions in the study. These questions by Byoir would be so framed that only the desired answers would be forthcoming—that the truckers must be more heavily taxed. Another use of these so-called independent survey organizations was to focus attention upon the trucks as destroyers of the highways and emphasize by "statistics", based on the false premise that truckers are the prime users of roads, that the truckers were the recipients of enormous public subsidies.

(5) With these statistics on hand have the "independent" organizations through Byoir publicize them from one end of the United States to another, through speeches, magazines and news releases.

[fol. 124] (6) Interest writers of important magazines in articles attacking the truckers and present the writers with all the statistics compiled by the "independent sources".

(7) With an outstanding magazine article have the organizations, through Byoir, intensify their campaign and then seek further articles with the ever-growing research material as a basis.

(8) While all of the above was being carried out to aid financially and in every other way legislators disposed to the railroads' point of view.

(9) Present the research packages and a hostile and aroused public to the Legislature and then propose the type of legislation determined by the associated railroads of that particular state as the type of legislation desired, and which to the associated railroads appeared feasible under the circumstances.

(10) Make absolutely certain that the general public attributed the entire campaign to public-spirited organizations only, keep the railroads in the background, and conceal particularly from objective-minded public officials interested in the problem the fact that the entire campaign was a creature of the railroads, the whole cost of the campaign being borne by the railroads, and for the purpose of hindering and destroying the trucking industry as a competitor to the railroads in the long-haul transportation industry.

It is clear from the above, regardless of the success or failure of legislation proposed by the railroads unfavorable to the truckers, that a real private injury to the truckers was accomplished. There was definitely a loss of good will to the trucking industry and in some instances that loss of good will was extreme. In the use of the term "good will" in this opinion I refer not only to the definition of Lord Eldon, who defined good will as "the probability that the old customers will resort to the old place", but also to the more comprehensive definition of Judge Story, "that good [fol. 125] will is the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it

receives from constant or habitual customers on account of its local position, or common celebrity, or reputation for skill, or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices." 24 Am. Jur. § 3, p. 803, and cases there cited. Therefore, the use of the term "good will" in the instant case relates not only to the direct damage done to the truckers, i. e., the refusal of truck users, because of the campaign, to avail themselves of that form of transportation (loss of business), but refers also to the more subtle type of injury done the entire trucking industry by discrediting it in the eyes of the general public, the 99% users of the highways, and eliminating the likelihood of public appreciation of the trucking industry as such or sympathy with the truckers' position which would be fundamental in gaining general public support to avoid the imposition of crippling burdens and restrictions.

The defendants' actions destroyed to a large extent the public confidence which the truckers had earned by their own efforts and which they might have won additionally, especially in the light of the innumerable beneficial accomplishments of the truckers in the field of long haul transportation. We must assume that most people are honest law-abiding citizens, and that includes those engaged in the trucking field. It certainly has not been proved in this case that all or even a substantial number of truckers are law breakers. To the contrary, the evidence in this case clearly shows that, except for a small segment, the truckers are decent law-abiding citizens who obey the law, but as a result of this campaign they were categorized as law-breakers, road-hoggers, completely indifferent to the safety of others on the highway and moochers on the public through failure to pay their way.

[fol. 126] As a final note it can be remarked at this point that, although not outlined above, overt acts to accomplish the objectives of this conspiracy were committed among others in the states of Connecticut, Indiana and Illinois. This feature is mentioned at this point to show that this was not a series of individual conspiracies but was one large ever-growing conspiracy with the single objective of "improving the competitive position of the railroad in the field

of transportation", but by the illegal means of limitation of or destruction of the trucking industry. Restated in extremely simple form I have found the following:

1. That the defendants combined in and about May 19, 1949 with the intent and object of substantially lessening competition in the long-haul carriage of freight in unreasonable restraint of trade.

2. That they were joined in this combination by the Byoir organization on or about August 15, 1949 for the same purpose and with the same intent and for a handsome remuneration.

3. The instrumentality or means by which this object was to be achieved was primarily by a campaign designed to destroy the good will of the truckers and, secondly, by fomenting governmental restrictions obtained by virtue of the methods outlined in the factual phase of this decision.

4. Hundreds of overt acts in furtherance of this plan were carried out throughout the country, and all in furtherance of the same object and design.

The Law of the Case.

A discussion of the law of the case must involve a consideration of the following legal questions:

(1) Was there a conspiracy in violation of the antitrust statutes? This question, of course, involves legality of means; legality of object; illegality of means and illegality of object.

[fol. 127] (2) The rule of reason in free competitive enterprise:

(3) Whether, if a conspiracy is shown to exist, the defendants' activities complained of caused injury both to the plaintiffs and to the public:

(4) Whether the defenses interposed by the defendants justify the activities complained of; this includes a determination of the question as to whether, as contended by the defendants, plaintiffs in instituting this action were motivated by a desire to bring the defendants into disrepute

in furtherance of an objective on the part of the plaintiffs to acquire a monopoly of the long-haul freight business:

(5) Whether, if an illegal conspiracy existed, the evidence presented is insufficient to link certain of the defendants with the activities as coconspiratory:

(6) Damages and relief.

After full consideration of the above problems the Court has determined its legal conclusions as follows:

(1) The defendants in this case formed a conspiracy in violation of the Sherman and Clayton Antitrust Acts for an illegal objective (injury to the truckers' business and good will and, if possible, the elimination of the truckers as competitors); that in concert and as co-conspirators the defendants attempted to use both legal and illegal means to accomplish their illegal objective.

(2) As to the rule of reason, the activities of the railroads and Byoir constituted unreasonable competition in a free competitive economic system.

(3) The activities of the railroads and Byoir caused injury to the trucker-plaintiffs and injury to the public.

(4) The defenses interposed by the defendants in this case are not available to the defendants under the facts of the case nor were the plaintiffs in instituting this action motivated by a desire to bring the defendants into disrepute [fol. 128] in furtherance of an objective to acquire a monopoly of the long-haul freight business.

(5) The Court, sitting as a jury, has found the evidence to be sufficient to link all of the defendants as co-conspirators in this case.

(6) As to damages and relief, the Court holds that all of the plaintiffs are entitled to injunctive relief against continuing illegal activities of the defendants. In addition, PMTA is entitled to compensatory damages, to be trebled as provided by statute, together with reasonable costs and attorney's fees; the remaining individual defendants are entitled only to nominal damages by virtue of a stipulation

filed in this action and which will be later fully discussed. But before proceeding to a discussion of the several legal questions involved a few general observations are in order.

The pertinent sections of the Sherman and Clayton Acts in this case are as follows:

Sherman Act § 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

Sherman Act § 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Clayton Act § 15.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides * * * and shall recover three-fold the damages [fol. 129] by him sustained, and the cost of suit, including a reasonable attorney's fee."

Fortunately antitrust law is living law. Being far from static, it, like the Constitution, is dynamic law to be adjusted to the times and to new situations. As Chief Justice Hughes aptly remarked in *Appalachian Coals, Inc. v. U. S.*, 288 U. S. 344, 359-60 (1933):

"As a charter of freedom the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. * * * The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness."

The court further pointed out that the Act should be construed in a broad and practical conception of the common law of restraint of trade and monopoly. As such the Act constitutes a flexible policy directed against all undue limitations on competition, both in the form of realized monopolization as well as partial but significant restraints of trade tending to the same end, or attempts to reach the prohibited end.

In a very comprehensive opinion in the case of *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946), at pages 809-810, 66 S. Ct. at page 1139. Mr. Justice Burton speaking for the court set forth the nature of the prohibitions of the Sherman Act in the following language:

> "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within [fol. 130] its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose."

As has been said, a conspiracy is not made out in so many words but must be gathered from the four corners of the evidence and the inferences to be drawn therefrom. Intelligent businessmen, aided by expert legal counsel, simply do not say, or put in writing, that they are going to drive a competitor out of business. And, of course, they did not in this case. However, courts today are aware of the subtle and tacit agreements now used to effectuate business conspiracies. That foregoing statement is made with the full realization that certain phases of the Byoir campaign were something less than subtle. The picture of conspiracy as a meeting by twilight of a trio of sinister

persons, with parted hats and close together, belongs to a darker age. *McConnell, The Treble Damage Action*, U. of Ill. Law Forum 659, 661 (1950). The distinct impression of the Court, sitting as a jury, in drawing the inferences from the evidence presented, is that this was a carefully calculated plan under the guidance of competent legal counsel which sought to choose a means of injuring and, if possible, destroying interstate truck competition that would afford the greatest amount of constitutional protection and thereby seek to render it immune from the coverage of the antitrust laws. A further inference to be drawn is that the plan was to be cast in the guise of a gigantic legislative campaign in order to attempt to surround it with the protections of the right to assemble, the right to petition the legislature and freedom of speech. With that thought in mind a calculated risk was taken that the plan adopted was the safest means of carrying out the predetermined object of seeking to maintain a monopoly in restraint of trade. Unfortunately, the gamble proved unsuccessful. The campaign of vilification upon the long-haul trucking indus- [fol. 131] try, which was the real instrumentality for carrying out this conspiracy, far exceeds the factual patterns presented in the *Slick Airways* case which will be discussed *infra* in detail. This was a deliberate attempt to injure a competitor for an illegal purpose by destroying public confidence in it. And that places this case into an area long denounced by the antitrust laws.

The factors bringing about the present action are new in the field of antitrust litigation and must be examined in the light of the climate of competition as it then existed. It is a battle between two great leaders of a highly competitive industry, both staffed with capable and expert legal counsel. Public relation techniques are closely interwoven with every facet of this case. The chief device used by the railroads, and to a lesser extent by the plaintiffs, which latter did not involve violation of the Sherman and Clayton Antitrust Acts, is one long known to political experts under the term, "The Big Lie". This technique, as it appears from the evidence in this case, has been virtually adopted in toto by certain public relations firms under the less insidious and more palatable name of "The third-party

technique". Its sole means and its effectiveness is to take a dramatic fragment of truth and by emphasis and repetition distort it into falsehood. That was the technique employed almost without exception by Byoir and the railroads throughout the campaign.

We will now proceed to discuss the legal questions in the order set forth at the opening of this section of the opinion.

The Conspiracy—Means and Objectives.

An unlawful conspiracy has been defined as a combination between two or more persons to do an unlawful or criminal act, or to do a lawful act by criminal or unlawful means: *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443 (1921). A lawful act may, when done by many in concert, become a conspiracy and public wrong and may [fol. 132] be prohibited; *Bedford Cut Stone Co.* v. *Journeyman Stone Cutters' Ass'n. of North America*, 274 U. S. 37 (1937). An unlawful conspiracy may be formed without simultaneous action or agreement on the part of the conspirators; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208 (1939). The civil liability for acts of conspiracy flows from the damages caused by the acts committed pursuant to the formed conspiracy; accurately speaking, there is no such thing as civil liability for conspiracy as such; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies; 11 Am. Jur. § 45, p. 577, and cases there cited.

Let us look at the record in this case. The acts committed by the defendants in pursuance of their plan reveal that the defendants formed an illegal conspiracy for an illegal object—injury to the truckers' business and good will and, if possible, the elimination of the truckers as competitors. By illegal means (the destruction of the truckers' good will) they sought to obtain their illegal objective. By what they claimed were legal means—appeals to the legislature—they also sought to accomplish their illegal objective.

The defendants have strenuously contended that all of their activities were geared to a legislative program and that none of their activities come within the orbit of

activities proscribed by the Sherman and Clayton Antitrust Acts. It has been noted and the Court here restates that the entire campaign and its objectives did not constitute a mere appeal to the legislature; nor was it a large-scale lobbying campaign. True, one phase of the activities was of a legislative nature—but a rather new approach to legislation, to say the least. The other phase, and the more important one of the campaign, was one of vilification designed to destroy the good will of the long-haul trucking industry. Hence, the Court has rejected the contention of the defendants that their combination was entirely legislative. I have further determined that the railroads were [Vol. 133] not acting as the guardian of the public welfare, as they have so earnestly asserted. Even counsel for the defendants at R. 2853 had to admit that the defendants were not motivated by "altruism".

It is in a situation such as this that the power and force of group action comes into play and the remarks of Mr. Justice Burton, *supra*, become very pertinent. When such group action is reinforced, as it was in this case, by unlimited financial resources to accomplish its objectives, it may very well and does in this case present a picture of activities proscribed by the Antitrust statutes. On the facts as found, a common law conspiracy has been made out.

The defendants in their arguments in this case have confused means and objectives. This problem was presented to Chief Judge Forman in the case of *Slick Airways v. American Airlines*, 107 F. Supp. 199 (D. N. J. 1952), appeal dismissed, 204 F. 2d 230 (3rd Cir. 1953), cert. denied, 346 U. S. 806 (1953). At page 207 Chief Judge Forman made this pertinent comment:

> "The defendants misconceive the nature of the complaint by confusing the means allegedly used with the result to be achieved * * * It is in this that they fall into error for these alleged acts rather constituted the means and methods by which the defendants conspired to drive the plaintiff out of business in violation of the anti-trust law."

A similar argument to the defendants' contention that their activities with regard to legislation were the only

activities for which they combined (which is untrue) was made before Judge Forman. The defendants there claimed that their appearance in that case before the Civil Aeronautics Board to block and delay the issuance of a certificate of convenience and necessity to the plaintiff to act as a common carrier was proper and legal. Judge Forman disposed of that contention in the following language at page 214:

> [fol. 134] "While it may be questioned whether any of this alleged activity by defendants of itself constituted illegal conduct, it is fundamental, as previously noted, that legal means may be utilized to accomplish the unlawful objective of conspiracy, *American Tobacco Co.* v. *U. S.*, *supra*; 328 U. S. at page 809, 66 S. Ct. 1125, 90 L. Ed. 1575, and this court cannot deprive the plaintiff of its right to attempt to prove that these alleged acts were part of the total acts undertaken to effectuate the alleged conspiracy."

The most recent decision dealing with the problem of confusion of object and means is *Parmlee Transportation Co.* v. *Keeshin, et al.*, 144 F. Supp. 480 (D. Ill. 1956). The plaintiff in that case was a transportation company which for over a quarter of a century was in the business of transporting (for the defendant railroads) from one to another of the eight railroad stations in Chicago, passengers and baggage in the process of interstate journeys. The plaintiff alleged that one Keeshin promised a member of the Interstate Commerce Commission a valuable consideration if he would persuade the individual railroad presidents to use their influence to cause their lines to eliminate plaintiff from the transfer business in Chicago and grant the contract instead to a corporation to be formed by Keeshin. This was to be accomplished by the ICC member representing to the railroad presidents that he would exercise influence on the ICC in their favor. The complaint avers that the new company was formed, that the plaintiffs were not allowed to compete for the contract and that a less favorable contract than the one under which they formerly operated was entered into by the railroads with the new corporation in pursuance to the agreement. The

defendants argued that the fact that the contract with the new corporation was an exclusive one did not make it illegal as a monopoly—which is true. They further argued that the contract made by the railroads acting together did not indicate the existence of a monopoly because they were not [fol. 135] competitors and were therefore in a position to deal with whom they pleased. In reply to these contentions Judge Sullivan noted, at page 484:

> "The flaws in the proposition lie in the minor premise: the assumption that the railroads could lawfully act together to grant a transfer contract ignores completely the complaint's allegation that the purpose and effect of that joint action was and is to prevent competition in biddings for contracts for terminal service. Acts otherwise lawful are 'within the proscription of the anti-trust statutes, *if done for the purposes prohibited by the anti-trust laws, i.e., to eliminate competition.*'"

This Court is not condemning the field of public relations. It is only condemning it as it was used in this case, as an instrumentality of destruction rather than one of promotion. Neither does the Court determine it illegal for an industry to seek any and every proper legislative goal; nor to enlist the support of other persons in obtaining legislation. But it is illegal to use the practices and methods shown by the record of this case to destroy a competitor's good will and to use third parties as fronts to carry out a conspiracy to destroy a competitor.

The proofs in this case have definitely established joint action on the part of all of the defendants to destroy the good will and injure the business of the plaintiffs. They have proved the formation of so-called "independent citizen groups" which were mere pawns in circulating information derogatory to the plaintiffs; dissemination of false information to customers of the plaintiffs for the same purpose; the organization of groups to protest the use of the highways by plaintiffs' "Big Trucks", and the duping and using of public officials and officials of independent organizations to accomplish the same purpose of driving the plaintiffs out of competition with the defendants. The actions of the

defendants do not fall within legal bounds of either proper means or proper objectives and consequently such activities must be condemned.

[fol. 136] Rule of Reason.

With the distinction between objectives and means disposed of, we now apply the facts as found to the climate of competition as it existed at the time the defendants embarked upon their legal plan. A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se. The plaintiffs have strenuously argued that per se violations have been made out in this case. I do not so find. The activities of the defendants were not such as to bring them within the purview of price fixing, refusing to deal with nonmembers of an association, thereby excluding a competitor from a substantial market, and the other classes of cases covered by that rule of law. See *United States* v. *Insurance Board of Cleveland*, 144 F. Supp. 684, 697 (D. Ohio 1956).

The record discloses that both sides used, or wanted to use, fronts and/or the propaganda technique. However, there is one very important distinction in the use of the technique by the parties; *the plaintiffs always used the technique for the affirmative purpose of seeking legislation which would be beneficial to themselves rather than to burden the railroads.* As they so often stated, and as the Court has found, they were seeking to remove what they called "The Chinese Wall" of low weight limitations which isolated it from the surrounding states. The plaintiffs engaged in the negative approach (which seeks to injure your competitor) only as a *defensive* measure after they were severely hurt in the public mind and the legislative halls by Byoir and the railroads. On the other hand, the defendants did not go out and seek to meet the new mode of competition by adjusting their facilities to the public demand, but rather *sought to destroy the good will built up by this new competitor through the campaign as outlined. This public relations battle of bogus organizations and dis-*

tortion of facts and vilification was not a climate of com- [fol. 137] *petition into which the defendants were injected. They created it.* They were faced with the budding seeds of competition growing in an area that was once a railroad monopoly in the long-haul freight business. Once the seeds started to flourish because of the flexible service given to shippers, the railroads resorted to the negative approach of injuring the competitor rather than adjusting their facilities to meet the growing seeds of competition. And they certainly could have met this competition on the field of *service* with their extensive facilities and ability to enter the trucking business in places where flexibility was desired and required by the shippers even at an increased cost. See *I. C. C.* v. *Parker*, 326 U. S. 60 (1945). Neither the railroads nor Byoir were new at this "propaganda" approach. As noted, the railroads had been harshly criticized for its use by the Wheeler Report, *supra*. Byoir received even harsher treatment for his use of the technique. He was found guilty of violating the antitrust laws in a suit growing out of its activities on behalf of the A & P, which was one of its major selling points in seeking and getting the ERPC account. Byoir's prior activities in the field are well pointed out by Judge Lindley in the case of *United States* v. *New York Great A & P Tea Co.*, 67 F. Supp. 626 (D. Ill. 1946), at pages 673 and 674, where he alludes to the false front activities. On appeal Judge Minton, later Mr. Justice Minton, also spoke harshly of Byoir's illegal activities in furtherance of a scheme to violate the antitrust laws at 173 F. 2d 79, 89, 90 (7th Cir. 1949).

It was Carl Byoir's view of antitrust law that there was no stigma attached to a violation thereof, and that "if you got caught you just ran into the wrong judge." In commenting upon the A & P decision Carl Byoir stated to Mr. Dilworth, then attorney for plaintiffs, in his deposition:

> "Now, you know and I know, Mr. Dilworth, that antitrust is not a law like going through a stop light, that it is a law on which you can go into twenty federal courts and get twenty different opinions on different [fol. 138] matters, and this was pursued. The antitrust people didn't like Carl Byoir and they pursued me

through five courts until they found a judge who had their view of antitrust. And I am not critical of it; it was his view; but as far as I am concerned I think every one of these organizations was a perfectly proper organization, *and if there is criticism that it wasn't publicized, sometimes you can't always get printed what you want to get printed.*" R. 2451; also see R. 228, 229. (Emphasis supplied.)

The above quotation, in the light of Byoir's previous conflicts with the statutes, shows a studied, consistent and contemptuous attitude toward the Antitrust Laws of the United States and his willingness to flout them at will, if the price was right.

In arriving at the conclusion that the defendants' conduct was unreasonable I have considered and alluded to: (1) The economic conditions peculiar to the industry, including the fact that both industries are heavily regulated; (2) The practices which have obtained; (3) The nature of the defendants' plan; (4) The reasons which led to its adoption; (5) The probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce and transportation. It follows logically that the ultimate effect of this plan would have been to deprive the shipping public of the great advantages of the flexible services provided by the trucking industry and would have relegated shippers to the use of railroad transportation only which was rapidly being proved out-dated (unless it adjusted itself, which it was in a position to do) to the modern demands of that same shipping public. See *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 361 (1933); *Board of Trade* v. *U. S.*, 246 U. S. 231 (1918), and *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 57 (1911) for the factors to be considered in an application of the rule of reason. [fol. 139] Applying these criteria the Court, sitting as a jury, finds that the defendants acted unreasonably in their campaign against the long-haul truckers.

Proximate Cause.

Prior to any discussion of the public and private injury which is necessary to support the plaintiffs' cause of action it is necessary to examine a stipulation of counsel. This stipulation was entered into on 17 May 1956 and, after approval by the Court, was filed of record as docket paper 460.

The stipulation in its pertinent sections reads as follows:

> "2. No plaintiff (except plaintiff Pennsylvania Motor Truck Association) has paid any counsel fees or expenses in connection with this suit, except as stated in paragraph 4." (Note: the importance of this section and section 4 will become apparent in the "Relief" phase of this decision.)
>
> "3. The only damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law in 1955."
>
> "4. Since 1949 plaintiffs (except plaintiff Pennsylvania Motor Truck Association) have supported the activities of the Pennsylvania Motor Truck Association by making contributions to the cost of such activities and none has objected to any such activities."

A reading of section 3 of the stipulation might at first give the impression that the plaintiffs have limited the proof of private and public injury to such that might flow from the veto of S. B. 615. This is far from the case. Proof of *monetary* (as contrasted with injury-type) dam- [fol. 140] ages and injunctive relief were the subjects of several pre-trial meetings of counsel with the Court. In the interest of limiting proof of *monetary* damage (as contrasted to injury to public and plaintiffs) and to shorten the trial of the case, counsel for the parties entered into the aforesaid stipulation. It is in that context and only that context that it is to be read. In that light it becomes apparent that its importance does not become a matter

for legal discussion until we arrive at the "Relief" and monetary (actual amount) damage phase of the decision.

In an action of this nature the plaintiff must allege and prove a violation of the act and damage to his business or property proximately resulting from the acts and conduct of the defendants which constitute a violation of the act. Injury to the plaintiffs in and of itself is not sufficient to warrant a civil action for injunctive relief and or damages. There must be harm to the general public in the form of undue restriction of trade and commerce as a result of the wrongful contract, combination or concerf of activity. However, the injury to the public need not be nationwide in geographical scope. If it involved monopolistic effect upon interstate commerce it may be narrow in geographic scope. It must, however, injuriously and appreciably affect the public interest. *Shotkin* v. *General Electric Co.*, 171 F. 2d 236, 238, 239 (10th Cir. 1948).

However, the Supreme Court has permitted plaintiffs in treble damage suits to rely on inferential and comparative evidence on the ground that the wrongdoer should bear the risk of the uncertainty which his wrong has created. See *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946); *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555 (1931). The Court made it clear that there is a great public interest involved in civil antitrust litigation since it forms one of the greatest deterrents to the violation of the antitrust laws by virtue of the prospect of a large money recovery by a plaintiff. Accordingly, and as noted [fol. 141] by the Court in the *Bigelow* case, difficulties of proof are no longer confused with the right of recovery.

A.

Public Injury.

The Court finds that defendants' activities were a substantial factor, and the proximate cause of injury to the public. The plaintiffs have shown a resultant increase in the cost to shippers and consumers of all commodities necessary to life, including clothing and food, a high percentage of which reaches consumers only by carriage in motor trucks. If the effect of the conspiracy is to increase

the cost of operation of the truckers, thereby increasing consumer's costs, an injury to the public is effected. The loss of business suffered by and expense entailed to each and every plaintiff and the industry as a whole in counteracting the undermining of public confidence was tremendous and quite obviously resulted in higher costs to the consumer. This in and of itself is a sufficient injury to support the cause of action. There is further public injury which flowed from the so-called legislative phase of the combination. Because of the legislative activities of the defendants, as set forth in the facts, the public was deprived of the flexible service and convenience supplied by this mode of transportation in certain of the states involved. Although a sufficient show of public injury has been made out on the basis of the prior discussion, this is an added proof that should be mentioned.

B.

Private Injury.

The plaintiffs have satisfied the Court by a preponderance of the evidence that the defendants' activities as set forth constituted a substantial factor in injuring the plaintiffs in their business and property. The private injury [fol. 142] was twofold, either part fully satisfying the requirement that defendants' actions constituted a proximate cause of private injury sufficient to support the plaintiffs' cause of action. The former has already been mentioned in the "Summary" section of the opinion. It was the tremendous loss of good will flowing from the defendants' efforts to undermine public confidence through its campaign of vilification. The damages flowing from the expenses entailed by PMTA in counterbalancing the defendants' campaign fully satisfy the Court of ample private injury. The damage to the individual plaintiffs through the loss of good will is also certainly present and fully meets the requirements of showing private injury. *Darden* v. *Besser*, 147 F. Supp. 376, 382 (E. D. Mich. 1956).

The second phase of the injury pertains to the legislative end of the conspiracy. Defendants' counsel in his opening argument admitted that the passage of S. B. 615 would

have enormously increased the gross revenues of trucks using the roads at a trifling increase in cost, (R. 42). A Byoir study distributed in the name of the Pennsylvania State Grange reported that fifteen typical motor carriers would have increased their gross annual earnings by more than 3½ million dollars for added license fee payments of only $26,352.00, (R. 704-710; P-112). This information was buttressed by a study of I. C. C. records which showed that five of the present plaintiffs would have grossed approximately one million dollars more in one year had S. B. 615 been passed, (R. 1316; P-169). The Byoir study further indicated that the veto meant that some five million dollars of freight was retained by the Pennsylvania Railroad because the truck limit was not raised, (R. 411; P-53). Mr. Mackie testified that in a typical area, defeat of the bill would result in a loss of revenue of $9,270.00 per truck per year (R. 1452), and one of the plaintiffs, Mr. Noerr, gave concrete illustrations of the injury to his own company's business, (R. 5473-5476). All of these [fol. 143] losses stem from the legislation in question but they are not necessary to a decision in this case. The injury to the individual plaintiffs and the PMTA flowing from the campaign of vilification fully satisfies the requisites of a valid cause of action made out by a preponderance of the evidence. The Court realizes that some of the money and expense which was expended in self-defense in counteracting the defendants' campaign would have been spent for publicity purposes without the railroad-created climate of competition. That point will be discussed in detail later in the opinion. Another important question which will be discussed at that time is whether the individual plaintiffs, except for the PMTA, have precluded themselves from recovering anything but nominal damages because of the stipulation limiting their claim to compensatory (as contrasted with injury and proximate cause) damages to those flowing from an executive act—the veto of S. B. 615.

Defenses.

The defendants seek to sustain their theory of the case on the basis of certain legal contentions which fall into

six general categories. While the present discussion will not comment upon all of defendants' case law, every contention and every case has been thoroughly examined, and it is the Court's opinion that a review in this opinion of the said contentions will be adequate for a proper disposition of the case. Each will be outlined and discussed individually in the order in which they appear, which is as follows:

1. A judicial tribunal may not invalidate a duly promulgated legislative or executive act.

2. The doctrine of separation of powers precludes a search for executive or legislative motives in carrying out their respective functions.

[fol. 144] 3. A monopoly created by virtue of duly enacted state legislation is without the ambit of the anti-trust laws.

4. The defendants' activities merely constituted an appeal to the legislature; that to deprive them of the right to act in the manner set forth in the facts would be to deprive them of the constitutional rights of freedom of speech, freedom to assemble and freedom to petition the legislature.

5. The plaintiffs in instituting this action were motivated by a desire to bring the defendants into disrepute in furtherance of their own objective to acquire a monopoly of the long-haul freight business.

6. A certain group of the defendants assert that even if an illegal conspiracy is found to exist (which they deny) they cannot be included as co-conspirators in spite of their membership, contribution to and general acceptance of the ERPC plan of attack, since they had no part in planning the details of the campaign, attended only a few of the ERPC meetings, and hence the evidence is insufficient to link them as co-conspirators.

1. & 2. These defenses relating directly to separation of powers of government are best understood by a joint discussion of the problems presented. The defendants place great reliance on the cases of *Arizona* v. *California*,

283 U. S. 423, 455 n. 7 (1931) and *Fletcher* v. *Peck*, 6 Cranch 87 (1810) to sustain their theory of the case. They argue that no inquiry may be made concerning the motives or wisdom of a state legislature or state executive acting within its proper scope of powers. By analogy they seek to carry these principles over to the case under consideration. In the opinion of the Court the analogy is not a valid one. This Court is in complete accord with the principles set forth in those cases. The plaintiffs do not seek to invalidate any legislation nor do they seek to inquire into Governor Fine's motives in vetoing S. B. 615, at least [fol. 145] at this state of the discussion. To the contrary, they seek to inquire into defendants' motives in seeking to have Governor Fine veto the measure. Further, the conduct in question preceded and was independent of the executive and legislative acts and was exerted against the entire public; it is for that reason that they are faced with the above suit. They attempted to effect a restraint forbidden by the Sherman Act and hence are not protected by legislation which helps to effectuate the conspiracy.

There may be some force and validity to defendants' argument concerning injury flowing from a legislative or executive act when we reach a discussion of the compensatory damage and relief stage of this opinion. But such argument has no valid place at this point of the discussion. The defendants' contention with respect to the two defenses under consideration is well answered by the Supreme Court in the case of *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 151 U. S. 1, 18, 19, 20 (1894). In that case there was legislative grant to the Portage Company to construct a railroad. The defendants bribed the officials of the grantee Portage Company to break their contract with the plaintiffs to construct the railroad for the Portage Company. Then by false representations the defendants induced the legislature to revoke the grant. *Fletcher* v. *Peck* was argued by the defendants as precluding any recovery by the plaintiffs. The Court first quoted from the *Fletcher* case in order to properly focus upon the law in question. It then applied those legal

principles to the facts as found in the *Angle* case and stated:

> "The rule upon which this decision (Fletcher) rests has been followed in many cases and has become a settled rule of our jurisprudence. The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of [fol. 146] expediency, the motives of the legislators, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly."

It was the defendants' position in the above case that any wrong done by the Omaha Company to Portage was done by the Wisconsin legislature acting in pursuance to its undoubted power in taking away the land from the Portage Company and giving it to Omaha. Thus, no court could inquire into the influence, motives or information under which those acts were passed. In answering this contention the Court said:

> "But it must be remembered that the wrongs of the Omaha Company were done before the legislature passed either the acts of 1882 or that of 1883, and it is to redress those wrongs that this suit was brought. Can it be that the legislature, by passing those acts, condoned the wrongs, and relieved the Omaha from any liability to the Portage Company? * * * An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged. The wrong was not one done by the state or in the act of the legislature

in taking away the land grant, *but in such proceedings on the part of the Omaha Company as put the Portage Company in a position which apparently called for the action of the legislature.* There is no more challenge of the validity of this legislation by suing the Omaha Company for the wrongs it did leading up to this legislation than there is in challenging the validity of a [fol. 147] criminal proceeding by an action against the prosecutor for malicious prosecution. * * * " (Emphasis supplied.)

A reading of this language makes it evident that it is applicable to the case at bar and the defendants' contentions in this respect must fall. Obviously, the doctrine of the *Fletcher* case has been extended to the personal protection of members of a legislative committee from a cause of action under the Civil Rights statutes when acting within the sphere of legitimate legislative activity. The Court is in complete agreement with that legal principle as set down in the case of *Tenney* v. *Brandhove*, 341 U. S. 367, 377, 378 (1951), and the principles applied in *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220, 224 (1949). However, they simply are not applicable to the case under discussion.

A situation somewhat analogous in principle to the case at bar is found in *Hazel Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238, 247 (1944). In that case Hartford was seeking a patent and realized it had no chance before the Patent Commissioner unless it could prove it had produced a novelty. In order to do so the defendant in support of its application filed an article ostensibly written by the president of the American Flint Glass Workers Union, which in fact was prepared by the Hartford Empire Co. and its agents and attorneys. The Supreme Court ordered the patent set aside despite the fact that the Court of Appeals, in upholding the patent, expressly stated that it had not been influenced by the questionable article. In setting aside the patent the Supreme Court stated:

" * * * Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for

such an attempted appraisal. Hartford's officials and lawyers thought the article material. They conceived [fol. 148] it in an effort to persuade a hostile Patent Office to grant their patent application, and went to considerable trouble and expenses to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did not specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness. Neither should they now be permitted to escape the consequences of Hartford's deceptive attribution of authorship to Clarke on the ground that what the article stated was true. Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given—that of a brief in behalf of Hartford, prepared by Hartford's agents, attorneys, and collaborators."

It is worthy of note that in the *Hazel Atlas* case, as in the case under consideration, the activities of the defendants were done without attribution in order to practice a fraud. It is also worthy of note that the Court was not impressed with the fact that the statements contained in the Clarke article might very well have been true. Here we have a situation where the statements sent out by Byoir were distortions of truth rather than truths and always without attribution. It was not only a fraud upon the legislatures and executives for an illegal purpose (to gain a monopoly), but it was also a fraud upon the public to gain that same purpose through the instrumentality of destroying the truckers' good will. Also, it should be kept in mind that the activities under attack also preceded the executive and legislative acts which the defendants claim are the only activities under scrutiny in the case. To the contrary, it is the entire railroad campaign, the destruction of good will, the fomenting of legislation and the vilification that are under attack.

[fol. 149] It should always be kept in mind that this Court has no desire to examine Governor Fine's motives in vetoing

S. B. 615. This Court is, however, interested in defendants' efforts to create motives. A cursory reading of the facts as found would quickly indicate that the destruction of the plaintiffs' good will was the primary goal of the defendants in their plan to monopolize the long-haul freight business; but even if their activities were found to be limited to attempts to obtain legislation or to seek the veto of S. B. 615, their conduct under the facts as found constituted illegal activity prohibited by the antitrust laws. See also Chief Judge Kirkpatrick's opinion in *Singer Sewing Machine Co.* v. *American Safety Table Co.*, 88 F. Supp. 260 (E. D. Pa. 1949).

3. We find another group of cases which advance the proposition that a legislatively-created monopoly is without the ambit of the antitrust laws. *United States* v. *Association of American Railroads*, 4 F. R. D. 510 (D. Neb. 1945); *Okefenokee Rural Electric Membership Cor.* v. *Florida Power & Light Co.*, 214 F. 2d 413 (5th Cir. 1954); *Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439 (1945); *Parker* v. *Brown*, 317 U. S. 341 (1943); *United States* v. *Rock Royal Co-operative*, 307 U. S. 533 (1939); *Mackay Radio & Telegraph Co.* v. *F. C. C.*, 97 F. 2d 641 (D. C. Cir. 1938); *Keogh* v. *Chicago & N. W. Ry.*, 260 U. S. 156 (1922); *Olsen* v. *Smith*, 195 U. S. 332 (1904); and the *Slaughter-House Cases*, 16 Wall. 36 (1873).

The defendants argue that since they were merely seeking to impose legislation upon the truckers any monopoly that they may have obtained by virtue of such legislation would be a legally protected one. In this argument they ignore the fact that their campaign was far more than a mere legislative scheme. They further ignore the principle that legal means may not be used to accomplish an illegal objective. This Court agrees that a legislature has the right and power to legally create a monopoly for the general welfare of the people, and that the recipient of such a [fol. 150] monopoly is legally protected, if his conduct is otherwise legal, as are the responsible government officials carrying out the will of the legislature. Further, the beneficiaries of such a monopoly, within permissible limits, may

enforce these rights in the courts. But it is not a mere legislatively-created monopoly that is under attack in this case. It is a conspiracy to destroy a competitor; a conspiracy to destroy his good will; the distortion of facts to further that end; the presentation of distorted and false information to the public and to public officials that are under attack, as well as the fomentation of government restrictions.

All of the cases cited by the defendants to advance the contentions set forth in this category explicitly recognize that the recipients of such a monopoly are not PER SE without the ambit of the antitrust laws, and certainly not when a legislative campaign forms a part of a conspiracy to gain an unlawful end. The language of the cited cases alluding to this problem is worthy of note:

In *U. S.* v. *Association of American Railroads*, 4 F. R. D. 510 (D. Neb. 1945), the Court at page 524 said:

> "It need hardly be observed, and is not questioned by the defendants, that, notwithstanding the important statutory function in the determination of interstate railroad charges, rates, fares, services, and practices of the Interstate Commerce Commission, the Sherman Act applies to interstate common carriers by rail as well as by other means. * * *."

And in *Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439 (1945) at page 456:

> "These carriers are subject to the anti-trust laws."
>
> * * * Regulated industries are not per se exempt from the Sherman Act * * *."

Finally, in *Parker* v. *Brown*, 317 U. S. 341 (1943) at page 351:

> [fol. 151] "There is no suggestion of a purpose to restrain state action in the Act's legislative history * * *."
>
> "True, a states does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or declaring that their action is lawful."

The plaintiffs in this case are not seeking to invalidate the legislation itself on the ground that it violates the Sherman Act as in *Parker* v. *Brown, supra*, nor are they seeking to undo the action of a state in creating a monopoly. See *Slick Airways, Inc.* v. *American Air Lines, supra*; cf. *Forgett* v. *Scharf*, 181 F. 2d 754, 756, 757 (3d Cir. 1950); *U. S.* v. *I. B. C.*, 150 F. Supp. 397, 404 (S. D. N. Y. 1957).

The defendants place great reliance on the case of *Okefenokee Rural Electric Membership Corp.* v. *Florida Power & Light Co., supra*. That case involved an action against a competing power company, Florida Power and Light Company, the City of Jacksonville, which was also in the power business, and the Commissioner for Utilities for the City of Jacksonville. The plaintiffs alleged that in pursuance of a conspiracy between the defendants they induced the Florida Highway Department to refuse permission to the plaintiffs to construct proposed lines along a state highway (which because of the marshy condition of the land was the only feasible route) by virtue of false arguments and a smear campaign that there were already pre-existing lines over the same route. The District Court found that the transaction was not one of interstate commerce because the sale and delivery to the ultimate consumer was in Florida in spite of the fact that the plaintiff's power source was in Georgia and the transmission lines carried it from that source continuously into Florida. In the alternative it found that even if interstate commerce were involved, the restraint was insubstantial and indirect. There is no doubt that interstate commerce is involved in the case at bar and further that the effects of the conspiracy upon that inter-[fol. 152] state commerce are both substantial and direct. The District Court in *Okefenokee* further found, and the Circuit Court agreed, that the orders complained of were the sole responsibility of the administrative boards, and the subject matter was exclusively within their jurisdiction; hence, the validity of those orders could be attacked only in an action of mandamus or other such remedy in the state court and could not be collaterally attacked in an antitrust proceeding.

The plaintiffs have not here limited themselves in their proofs to those injuries proximately resulting from the veto

of S. B. 615 in seeking to sustain their cause of action. Their allegations and proofs go far beyond anything so narrow as that executive act. The effect of the campaign to destroy the truckers' good will had a very substantial and direct effect upon interstate commerce and hence this case is beyond the law of the *Okefenokee* case insofar as plaintiffs' ability to sustain their cause of action is concerned. Defendants have earnestly striven to convince the Court, sitting as a jury, that the plaintiffs' entire case (not simply their right to compensatory damages) is limited to complaints of the defendants' attempts to seek legislation and the loss flowing from such. Hence, they seek to bring themselves within the purview of the *Okefenokee* case. In that respect they have failed to convince the Court.

Further, the truckers do not contend that they have an unrestricted legal right to use the highways; nor are they attempting to alter any decision of any responsible public official. But they did have a legal right to be in the transportation business. Unlike *Okefenokee*, and like *Angle*, the defendants conspired to destroy the good will of their chief competitor in furtherance of their illegal objective, independent of any legislative or executive act. The limitation of the case to an executive act appears only when the stipulation of counsel comes into the fore upon a discussion of the compensatory or actual damages to be allowed the plaintiffs.

[fol. 153] Any discussion of immunity from the antitrust laws because of the alleged presence of a legislative act as the instrumentality for furthering the object of monopolizing a segment of an industry requires an examination of Mr. Justice Holmes' opinion in the case of *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 358 (1909). This is the last of three cases upon which the defendants place great reliance, the other two being *Fletcher* v. *Peck* and the *Okefenokee* cases. The *Banana* case has been reviewed on many occasions since it was decided in 1909, and a proper examination of the law as set down in that case requires a reading of that decision in the light of subsequent Supreme Court decisions. The two most enlightening expositions are found in *United States* v. *Sisal Sales Corp.*, 274 U. S. 268, 275, 276 (1927) and *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 288 (1952).

An examination of these cases makes it apparent that the rule of the *Banana* case is not controlling under the facts as found. The court in the *Banana* case simply held that it was not the Congressional intent in passing the Sherman Act to extend its coverage and prohibitions to an alleged monopoly grounded on a seizure of property in pursuance of a sovereign act of a foreign nation. They then found that the acts in question did not constitute a tort in the place where the activity occurred. In the case under consideration the railroads' activities were in no way limited to securing legislation or influencing executive acts. The principle that no legal damages can flow from the acts as such is important in this case only as to any limitation upon the monetary damages claimed by the plaintiffs. Finally, as opposed to the facts in the *Banana* case, all of the facts—the destruction of good will, the vilification, the distortion, as well as the attempts to foment legislation, occurred within the United States.

In the *Sisal* case the court granted an injunction against several individuals and corporations who by virtue of a conspiracy had obtained control of the importation and sale of [fol. 154] sisal from Mexico and a complete monopoly of the internal and external trade and commerce in that product. Although sisal was a product of Mexico, a foreign country, and the monopoly was effectuated by securing the passage of discriminating legislation in that country, the court held that the activities in question were in violation of the Sherman Antitrust Act and the Wilson Tariff Act and that the case was not controlled by the *Banana* decision, pointing to the above-referred-to narrow application of the *Banana* doctrine.

In the *Bulova Watch Co.* case, Bulova sought an injunction and monetary damages against an American citizen and resident for acts of trade-mark infringement and unfair competition consummated in Mexico. Learning that the plaintiff, which produced a nationally advertised watch, had not registered its trade-mark under the laws of Mexico, the defendant procured a Mexican registration for himself for the trade-mark "Bulova." He then proceeded to conduct a watch business in Mexico City, where without Bulova's authorization and with the purpose of deceiving

the buying public, he stamped the name "Bulova" on watches there assembled and sold same, many of them eventually turning up for repair, in the United States. The defendant argued that the *Banana* case was controlling and that the plaintiff's cause of action should be dismissed. In refuting this claim the court said at page 288:

> "*American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), compels nothing to the contrary * * * This Court agreed that a violation of American laws could not be grounded on a foreign nation's sovereign acts. Viewed in its context, the holding in that case was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country, absent in the posture of the *Banana* case before us, are often decisive; this Court [fol. 155] held as much in *Thomsen* v. *Cayser*, 243 U. S. 66 (1917), and *United States* v. *Sisal Sales Corp.*, 274 U. S. 268 (1927). As in *Sisal*, the crux of the complaint here is 'not merely of something done by another government at the instigation of private parties;' petitioner by his 'own deliberate acts, here and elsewhere . . . brought about forbidden results within the United States.' 274 U. S., at 276 * * *"

In the light of the above cases and discussion it is evident that the *Banana* case is not controlling of the outcome of this case, certainly insofar as the plaintiffs sustaining their cause of action.

4. We now come to a contention by the defendants which has been previously mentioned with respect to the Court's finding concerning the birth of this conspiracy and the calculated risk pursued by the railroads in their campaign against the trucking industry. This Court is most sensitive to the fact that constitutional rights are not to be treated lightly. The desire to insure against any tyranny of law was the moving force behind the creation of our great constitutional safeguards. It is with that thought in mind that the Court approaches this contention, namely,

that the defendants' activities or concert of action are protected by virtue of the constitutional rights of freedom of speech, freedom of assembly, and freedom to petition the legislature. The defendants point to the cases of *U. S.* v. *CIO*, 335 U. S. 106 (1948); *Near* v. *Minn.*, 283 U. S. 697 (1931); *U. S.* v. *Cruikshank*, 92 U. S. 542 (1875), among others, in support of their argument. The Court has thoroughly examined the legal principles set forth in those cases, as well as the more recent expositions on those subjects and allied subjects, and finds that they do not extend to the conduct in question. There is no question of a prior restraint involved in this case. The defendants are not being precluded from publishing anything within legal limitations; nor are they being, nor will they be, restrained from petitioning the legislature. Furtner, the Court is not pre- [fol. 156] cluding the defendants or anyone else from seeking out allies. As has already been stated, this is no attack upon public relations or the achievement of a legislative goal through publications, speeches, press releases, or the alignment of friends to seek to accomplish a valid legislative purpose. But when these resources are utilized for the purpose of applying the great power and wealth of group action against a competitor in order to accomplish an illegal objective—the monopolization of the long-haul freight business, they become something more than mere freedom of speech, freedom to assembly, or freedom to petition the legislature—they become an illegal conspiracy. When facts are distorted, allies are "created", public and private officials are "duped" and "used", attempts are made to secure decisions of public officials by virtue of "facts" and "research" which are distortions of truth, and which in the defendants' own language constituted the "planting" of their "poison", we go far beyond the scope of constitutional privilege. *Kansas City Star Co.* v. *U. S.*, 240 F. 2d 643, 665, 666 (1957). It is not now, and it never has been the law, that a common law conspiracy is within the confines of constitutional protections. The clear and present danger test has never been applied to a conspiracy which reaches the stage of hundreds of overt acts in pursuance of a plan to destroy. This situation has been presented to the Supreme Court before in the case of *Giboney* v. *Empire Storage and*

Ice Company, 336 U. S. 490 (1949). The legal principles stated there are certainly applicable here. This is a new type of conspiracy carefully planned to circumvent prior decisions. The *Giboney* case is one of a series of cases involving the application of freedom of speech to peaceful picketing, but is not in any way limited to that state of facts. The case concerned the constitutional power of Missouri to apply its anti-trade-restraint law to the activities of labor unions, and to enjoin union members from peaceful picketing carried on as a course of conduct which [fol. 157] was in violation of the Missouri law noted. The State law in question reads as follows:

> "Combinations in Restraint of Trade Declared a Conspiracy. Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, *transportation*, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article. Mo. Rev. Stat. Anno. § 8301 (1939)." (Emphasis supplied.)

The similarity to the antitrust laws is certainly of more than passing interest. In that case an ice peddlers' union was seeking to break down the resistance of nonmember peddlers who refused to join the union by inducing wholesale distributors to agree not to sell ice to nonunion peddlers. The union's objective was to secure higher wages and better working conditions for its members. When the plaintiff/distributor refused to go along with the union plan, the union resorted to peaceful picketing, the effect of which was to reduce the distributor's business 85%.

In upholding the grant of the state court injunction against a continuation of the defendant's activities in that case, Mr. Justice Black stated at pages 501 and 502:

> "* * * No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of

speech or press to violate valid laws designed to protect important interests of society."

"* * * Nor can we say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts * * * For the placards were to effectuate the purposes of an unlawful combination, and their sole, [fol. 158] unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

* * * *Such an expensive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.*" (Emphasis supplied.)

There is no question but that the language above is applicable to federal as well as state laws which deem a course of conduct to be detrimental to the public good and illegal. The antitrust laws are valid laws. They indicate the public policy of the Congress of the United States in the field of competitive business. The defendants have engaged in a course of conduct which satisfies the requirements of a common law conspiracy as well as a violation of these laws. *Caraway* v. *Ford Motor Company,* 148 F. Supp. 776, 777 (D. Mo. 1957). In that posture it becomes apparent that the defendants' conduct is not within that broad expanse of conduct which is protected by the First and Fourteenth Amendments. What the defendants have combined to do is something more than free speech; something more than freedom to assembly; something more than a petition

to the legislature. They have engaged in a course of conduct designed to destroy the good will of a competitor in order to secure a monopoly—all of this in violation of a valid public policy set down many years ago by the Con- [fol. 159] gress of the United States. The Supreme Court has said explicitly that a course of conduct in violation of a strong public policy established either by law or ad hoc decisions may constitute a course of activity without the ambit of constitutional protections. *Hughes* v. *Superior Court*, 339 U. S. 460 (1950); *International Brotherhood* v. *Hanke*, 339 U. S. 470 (1950); *International Brotherhood* v. *Vogt, Inc.*, 25 L. W. 4505.

Much stronger is the fact situation as found by the Court in this case than of those above cited. Further, the Court finds that the defendants also violated another Federal law in the course of their campaign of vilification. In pursuing this plan the railroads, through Byoir, staged a television program broadcast in the name of the Association of Pennsylvania Township Supervisors over Station WGAL in Lancaster, Pennsylvania, which failed to disclose the railroad sponsorship, in violation of the Federal Communications Act, 47 U. S. C. A. § 317,[1] which reads as follows:

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(1) 47 U. S. C. A. § 153 "Definitions (b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, *pictures*, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." (Emphasis supplied.)

(k) "'Radio station' or 'station' means a station equipped to engage in radio communication or radio transmission of energy."

Subsection (b) of this section defining radio communication includes television as one form of radio transmission and this chapter applies to every phase of television. See *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 155 (3d Cir. 1950), cert. den., 340 U. S. 929 (1951).

At page 155 Chief Judge Biggs said:

"Section 3(b), 47 U. S. C. A. § 153(b), defines 'Radio communication' as 'The transmission by radio of writing, signs, signals, pictures, and sounds of all kinds * * *'. The television and radio industries have construed this definition to include television as 'one form of radio transmission'. There can be no doubt of the correctness of this construction."

"All matter broadcast by any radio station for which service, money, or any other valuable consideration is [fol. 160] directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished as the case may be, by such person."

Hardy, the Byoir agent in Pennsylvania, prepared the telecast, and the ERPC ultimately paid for it in full. In accordance with the standard procedure throughout their campaign there was no mention of the ERPC or Byoir. Further, there is ample evidence to warrant the finding that there was no intent to discontinue the above-noted practice. To the contrary, had it not been for this lawsuit there no doubt would have been an increased use of TV and radio by Byoir under the sponsorship of a "front" and, of course, without attribution to the defendants.

Circuit Judge Prettyman in commenting upon this provision of the Communications Act stated that Congress has frequently placed limitations upon the use of the mails and broadcasting. In referring to broadcasts he pointed out that such activity was permeated with a public interest and hence the public was entitled to know who was addressing it over the air. He pointed out that all political parties identify themselves over the air in order to make their appeal useful and that the only reason for anonymity of political broadcasting must be a purpose of deception. *Communist Party of U. S.* v. *Subversive Activities Control Board*, 223 F. 2d 531, 556 (D. C. Cir. 1954), *reversed on other grounds* in 351 U. S. 115 (1956); cf. *United States* v. *Harriss*, 347 U. S. 612 (1954) and *Securities & Exchange Commission* v. *Morgan, Lewis & Bockius*, 113 F. Supp. 85 (E. D. Pa. 1953), aff'd. 209 F. 2d 44 (3d Cir. 1953).

It has been the position of both the railroads and Byoir that the success of their campaign was entirely dependent upon nonattribution to the railroads. In the light of the frequent distortion of facts by Byoir in its news releases, Judge Prettyman's comment concerning deception becomes [fol. 161] extremely pertinent. In any event, this is a further example of how the defendant's conduct, although at-

tempted to be shrouded with a legislative cloak, ultimately narrows down to an illegal conspiracy to utilize the group power of the ERPC and Byoir to destroy the good will of the trucking industry in order to secure a monopoly in restraint of trade and in violation of the antitrust laws.

Another case dealing with this subject is the *Associated Press* v. *United States*, 326 U. S. 1, 7 (1945). The court there stated that it would degrade the clear and present danger doctrine "to fashion from it a shield for business publishers who engage in business practices condemned by the Sherman Act."

And in the case of *Kobe* v. *Dempsey Pump Co.*, 198 F. 2d 416, 424, 425 (10th Cir. 1952), cert. denied, 344 U. S. 837 (1952), we find a situation where the defendants had instituted admittedly valid patent infringement suits as part of a broader design to violate the antitrust laws. The court held that in the light of that improper objective the privilege of bringing a valid suit was no longer present and the conduct was found to be illegal. Also see *Cape Cod Food Products, Inc.* v. *National Cranberry Association*, 119 F. Supp. 900, 907 (D. Mass. 1954), and *Forgett* v. *Scharf*, 181 F. 2d, 754, 756, 757 (3d Cir. 1950).

In the light of the facts as found and the applicable cases, the defendants' argument that their conduct is constitutionally protected must fall of its own weight.

5. The Court will not go into great detail in examining the question of plaintiffs' motives in instituting this action because that question has been covered extensively under the heading of "The Counterclaims". It will simply be mentioned that neither a finding of improper motives on the plaintiffs' part in bringing suit nor a determination that the plaintiffs were also monopolists would constitute a defense, under the circumstances, to plaintiffs' cause of action. See *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214 (1951); *Moore* v. *Mead Service Co.*, 340 U. S. [fol. 162] 944 (1951); *Foremost Promotions* v. *Pabst Brewing Co.*, 15 F. R. D. 128 (N. D. Ill. 1953); *U. S.* v. *Cotton Valley Operators Committee*, 75 F. Supp. 1 (D. La. 1948); *Higgins* v. *Shenango Pottery*, 99 F. Supp. 522, 525 (W. D. Pa. 1951); and 29 *N. Y. L. Rev.* 1463, 1470 (1954).

6. We come now to the defendants' final contention. This defense is presented on behalf of the following defendants: Boston and Maine Railroad, Canadian National Railways, Canadian Pacific Railway Company, Lehigh & New England Railroad Company, Maine Central Railroad Company, Pittsburgh & West Virginia Railway Company and Charles J. Graham, Individually and as President, the Delaware and Hudson Railroad Corporation, The New York, New Haven and Hartford Railroad Company, the Union Railroad Company and Fred W. Okie, individually and as President of that Company. They argue that even if a conspiracy is found to exist, the mere fact of membership in ERPC does not establish concert of action on their part, and that there is not sufficient other evidence to include them as co-conspirators. The Court agrees with the first part of their arguments. Mere membership in an unincorporated association, in and of itself, is not sufficient to establish liability for conspiracy. *Phelps Dodge Refining Corp.* v. *FTC*, 139 F. 2d 393, 396 (2d Cir. 1943). If the purposes of an association are lawful on their face its members should not be held for the acts of the association outside its purposes, *unless knowledge of the illegal acts is brought home to the members. Phelps Dodge Refining Corp.* v. *FTC*, *supra.*

In the light of the italicized reasoning the Court must differ with the latter part of defendants' argument, viz., that the evidence does not prove knowledge on the part of these defendants of the real ERPC objective and purpose. On the basis of all the evidence the Court finds that these defendants, although not involved in the carrying out of the details of the campaign, had full knowledge of its illegal object and general means for achieving that [fol. 163] objective. First of all, the Byoir contract with the ER-TC provided in paragraph 7 that "The party of the second part (Byoir) agrees to consult with and be wholly guided by the party of the first part (ER-TC) on all questions of policy to the end that no material shall be released to the public, or to anyone, giving any impression contrary to the established policies of the party of the first part" (R. 101-102; P-4). The Transportation Committee (ER-TC) was appointed by and created by the ERPC and these de-

fendants were regular contributing members of the ERPC. Further, the Court finds that the provisions of this section of the contract were followed and that the responsible committee heads of ER-TC were always kept abreast of Byoir's activities and that they in turn reported to all the participating members of ERPC.

All of the railroads were assessed under the Conference budget and it was on this basis that the individual contributions to the Conference were allotted. This same budget contained a specific item for the Competitive Transportation Committee (ER-TC), which was by far the largest item in the entire budget, and that budget was sent to all members of the ERPC including the above mentioned defendants (P-195).

In order to buttress this evidence we need merely to look at Canadian National Railway Company's answer to plaintiffs' interrogatory No. 3 in which they stated that their payments to ERPC " * * * were made from time to time upon the understanding that the same, together with payments of other members of ERPC were to be used for the requirements of ERPC as from time to time described in its budgets and requests for such payments." The Canadian Pacific Railway Company in answering the same further admitted that " * * * such payments were made from time to time upon the understanding that the same, together with payments of other members of ERPC, were to be used for the requirements of ERPC" (P-264).

Further, the minutes of the Conference specifically showing appropriations for the competitive Transportation [fol. 164] Committee, including Byoir's activities and such other activities as the rural roads film, were sent to all members of the ERPC, (P-190). These same minutes specifically indicate the attendance of Messrs. Okie and Graham, two of the above defendants. An examination of the notes of testimony reveals that Mr. Girdler's (Byoir's ERPC account executive), memorandum setting forth the objectives of the program was sent to all of the railroad presidents (R. 267) and that the entire ERPC approved the Byoir plan (R. 845-846). While it is true that the memorandum obviously did not set forth the details of the conspiracy,

it did sufficiently lay the groundwork from which any jury might infer, along with all the other evidence, the presence of knowledge.

The evidence further reveals that Byoir reported to the presidents themselves almost every month (R. 847), and that Mr. Deegan, the Public Relations Subcommittee head, approved the Byoir bills to the Conference. Of course, Mr. Deegan was appointed by and represented all of the Presidents as head of that Subcommittee. There is no question but that ERPC was familiar with the goals which Byoir sought to attain and that the President's Conference never disapproved anything which Byoir did in carrying out the terms of its agreement (R. 224, 225; 1457-1458).

Finally, it must be remembered that competition by nonattribution was not something new to the railroads, as evidenced by the criticism of the Wheeler Report. In the light of that report it becomes more evident that all defendants knew what was meant by the "objectives" and the ERPC "policy".

The Court points to these specific evidences of knowledge not with the intent of having them constitute the sum total of such evidence. They are merely indicative of some of the more obvious considerations that led to the Court's finding that there was ample evidence of knowledge on the part of all defendants, and that as representatives acting in behalf of their respective companies, all defendants were [fol. 165] co-conspirators in this illegal plan to ultimately destroy the trucking industry. It is hornbook law that the agreement need not be proved by direct evidence and that conduct pointing to concerted action is sufficient to make out membership in, and the presence of, a conspiracy. In order that one be found guilty as a conspirator it need only be shown that, with knowledge of the conspiracy, he knowingly performed acts designed to promote or aid in the attainment of the object of the known conspiracy. *United States* v. *National City Lines*, 186 F. 2d 562 (7th Cir. 1951), cert. denied, 341 U. S. 916 (1951).

There has been presented ample evidence to satisfy the Court as to a finding of knowledge, as well as a finding of agency on the part of the presidents to impute their con-

duct to the respective corporate defendants. As stated by the court in *U. S.* v. *Morgan*, 118 F. Supp. 621 (S. D. N. Y. 1953), in a suit under the antitrust laws, once a conspiracy is shown to have existed, only slight evidence is necessary to connect individual co-conspirators with the illegal undertaking. In the case at bar more than slight evidence has been presented to and believed by the Court.

In concluding this phase of the opinion, the Court will summarize and make a few general observations concerning the presence of the conspiracy. It is clear that the plaintiffs prove an intent to unreasonably restrain trade and hundreds of overt acts in furtherance of that illegal object. Without limiting anything that has already been stated there are three important factors of this case which demonstrate defendants' ultimate objective. First, the railroads realized that if truck rates were increased appreciably above their already higher price shippers would have to again use the railroads despite the flexibility and service of the truck. Every phase of the Byoir-railroad campaign was designed to do that very thing. Secondly, they further realized that any change in the amount the truckers paid in state and local taxes would greatly weaken them as a competitive factor and, of course, their "use" of the independent or- [fol. 166] ganizations and distortion of facts was constantly aimed in that direction. Finally, a very interesting situation arose during the Korean conflict which bore directly upon the question of intent to restrain commerce. A discussion arose among members of the ERPC Public Relations Subcommittee concerning the antitruck program being carried out by Byoir and the ERPC in the light of an impending freight car shortage brought on by the Korean War. The participants were fearful of discontinuing the campaign, and yet they wondered how they could justify their efforts to make long-haul trucking more expensive when *with the car shortage they were not in a position to handle any greater volume of business.* The problem was well illustrated in a letter from Mr. Selvage to Mr. Deegan dated August 9, 1950 (D-28). The pertinent section reads as follows:

> The program to date has been largely negative aimed directly at the trucks and designed to curb their more

nefarious activities. Now, with a war situation approaching, with the possibility that there would be a shortage of freight cars (and resultantly a demand for using any kind of a vehicle to move cargo), might it not become unpopular to urge curtailment of any form of transportation. It would be like duPont saying we can't make all of the nylon that is needed but protesting anyone else making it."

James G. Lyne, Editor of Railway Age, commented upon the same problem in a letter of September 26, 1950 to Mr. Littlefield (P-251) and noted that the position of the ERPC concerning trucks would certainly be challenged because they "are playing the dog in the manger in that they are trying to make things tough for the trucks, while they (Railroads) themselves cannot handle the traffic." However, in spite of these queries Mr. Deegan stated flatly that there was no alteration in the campaign (R. 1850, 1851). It appears rather incongruous that the self-styled guardians of the public interest should have such an utter contempt for the same interest during a time of emergency. Mr. [fol. 167] Lyne, in the above-mentioned letter, after stating the problem gave his own answer which indicated to this Court a completely self-serving attitude. While cast in language indicative of a railroad concern for public interest, its true import was to the effect that "we know what OUR standard answer to the public is whenever we are approached with such a situation."

Relief.

The subject of relief will be discussed under three separate headings for the purpose of clarity, namely, Injunctive Relief, Counsel Fees and Costs, and Compensatory (actual) Damages.

A.

INJUNCTIVE RELIEF.

On the basis of the facts as found it is apparent to the Court that the plaintiffs, both the individual ones and the PMTA, have been irreparably harmed and that there is a

strong possibility that the defendants are ready, willing and able to continue with their campaign to destroy the good will of the long-haul trucking industry unless they are restrained. While it is true that the intensity of the campaign has diminished with the institution of this suit, it is also clear that it will be renewed with equal vigor upon a termination of this litigation unless the Court grants injunctive relief to the plaintiffs. The defendants were ready to extend the campaign to other states and to intensify activities in the states initially chosen as starting points in the campaign to monopolize the industry. In the light of those facts and the defendants' propensity towards the use of the technique set forth in extenso in this opinion, a restraining order will be issued in favor of all plaintiffs and against the ERPC and all the corporate defendants, including Byoir. *Georgia* v. *Pennsylvania Railroad*, 324 U. S. 439, 462 (1945). All individual defendants will be excluded since they are either officers or employees of the corporate defendants and as such will be bound by the terms of the injunction to be issued.

[fol. 168] In government antitrust cases it is customary to allow the parties to submit a form of proposed restraining order to guide the court in the exercise of this equity power. Since there is no difference in principle between a government suit and a private suit under the antitrust laws, the Court will utilize that same procedure in this case. The plaintiffs are to submit a proposed injunction, not inconsistent with the findings as set forth, within thirty (30) days from the filing date of this opinion. The defendants, on the other hand, may file exceptions thereto within fifteen (15) days, and after hearing thereon the final order will issue.

B.

ATTORNEY'S FEES AND COSTS.

In the light of paragraph two of the stipulation of counsel set forth in this opinion, supra, stating that the costs including the attorney's fees were borne by the PMTA only, such fees will not be awarded in favor of the individual plaintiffs. At an appropriate future date the Court, in

accordance with the pre-trial discussions concerning injunctive relief and proofs of the plaintiffs' actual damages and costs, will take testimony as to the extent of PMTA's costs and a reasonable attorney's fee. Thereafter, an award of costs and a reasonable attorney's fee will be made in favor of the PMTA and against all the corporate defendants including Byoir; the expense to each railroad defendant (ERPC and the individual defendants will be excluded) will be apportioned according to their 1951 percentage contribution to ERPC. Byoir's contribution will be stated under "Summary of Relief."

C.

COMPENSATORY DAMAGES.

On the basis of the Court's conclusions of law all the plaintiffs are entitled to threefold the damages suffered by them due to injury to their business and property flowing from the defendants' conduct. In accordance with the pre-[fol. 169] trial agreement that evidence of actual damage would be heard at a later date in the event that plaintiffs sustained their cause of action, plaintiffs limited their proofs to evidence of general injury flowing from defendants' conduct without attempting to introduce evidence of the actual damage to each individual plaintiff. If it were not for the stipulation of counsel referred to, supra, the Court would be prepared to grant damages to each individual plaintiff as well as the PMTA upon a hearing of evidence pointing to the actual damage suffered by them.

The damages to the individual plaintiffs would fall into two main classes—those flowing from the direct loss of good will, prestige and business, as a result of the campaign of vilification and other Byoir activities, and those flowing from the loss of potential revenue and consequent loss of profits as a proximate cause of the defendants' campaign to foment legislation. However, there have been drastic limitations placed on the scope of recoverable damages in this case by virtue of the aforesaid stipulation of counsel which limits recovery insofar as the individual plaintiffs are concerned to *those damages flowing from the loss of potential revenue occasioned by Governor Fine's*

veto of S. B. 615. The stipulation specifically excluded the PMTA from any such limitation. Because of these considerations any attempt to ascertain damages will require a distinction between those flowing to the individual plaintiffs and those flowing to the PMTA.

1.

PMTA Damages.

As already stated, the defendants' tactics ultimately forced the PMTA, as the representative of the trucking industry in Pennsylvania, to resort to a campaign of self-defense or face increasing difficulties with the ultimate possibility of extinction. The expenditures directly occasioned by that defensive campaign will be returned to PMTA in the form of a money recovery. Evidence of such [fol. 170] expenditures proximately resulting from the defendants' *illegal* activities will be heard at a later date along with the evidence of attorney's fees and costs. In determining the extent of recovery to PMTA the Court will take into consideration the fact that PMTA would have expended considerable sums for publicity purposes independent of the railroad activities; it will also consider the fact that the PMTA budgetary trend in the field of publicity was an upward one, again independent of railroad activities. Since the stipulation of counsel, which will be again referred to in detail, does not apply to PMTA they shall recover any damages that they may prove at the appointed time. These damages shall be assessed against all the corporate defendants, including Byoir, but shall not extend to ERPC and the individual defendants. All the damages plus reasonable attorney's fees and costs shall be assessed in the following manner: twenty percent to be borne by Byoir, said amount not to be reimbursed by the ERPC; the remaining eighty percent to be assessed against the remaining railroad-corporate defendants on the basis of their percentage contributions to ERPC for the year 1951.

2.

Plaintiffs Other Than PMTA.

These plaintiffs were injured as a proximate result of the defendants' activities in two ways: (1) All of Byoir's and the railroads' activities other than the fomentation of governmental restrictions resulted in a substantial loss of good will (business losses) to these plaintiffs; (2) the fomenting of governmental restriction when done in the manner set forth in the findings and as part of an unlawful object of maintaining a monopoly caused injury to these parties by increasing the cost of operation and/or preventing the carrying of greater loads. Either or both of these injuries are legal injuries insofar as the *fact* (proximate cause), as contrasted with the amount of injury is concerned. However, the second type of injury, in the light [fol. 171] of the stipulation of counsel, cannot be regarded by the Court as a legal injury insofar as the calculation of *amount* of damages is concerned.

While it is true that the damage flowing from the loss of good will is difficult of ascertainment, such difficulty has never been associated with impossibility of ascertainment. The Court in view of its conclusions would (absent the stipulation) grant actual damages to each of these plaintiffs upon the presentation of evidence of their individual losses. *Darden* v. *Besser*, 147 F. Supp. 376, 382 (E. D. Mich. 1956). However, the presence of the stipulation completely alters the case at this point and severely limits the amount of recovery on the part of these plaintiffs.

The standard to be applied in ascertaining the *amount* of damages in treble damage actions was set down in the case of *Story Patchment Co.* v. *Paterson Co., supra,* at page 563:

> "'The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount.'"

Subsequent decisions have clarified the standard and indicated that a liberal interpretation is to be applied to that rule. In effect, these subsequent cases, such as the *Bigelow* case, *supra*, establish the rule that the measure of proof for the fact of damage is identical with the measure of proof of the amount. Either may be sustained upon a showing of any substantial evidence in the record to support such a finding. See *McConnell, The Treble Damage Action* at 667, 668, *supra*. As a practical matter the courts have come close to applying the damage rule applicable to the tortious confusion of goods (let the wrongdoer's liability for damages be measured by the value of the entire mass unless he can introduce evidence of the separate values of [fol. 172] the tortiously acquired property and the finished product). This rule was applied in a case where the defendant motion picture operator mixed the receipts from the monopolized shows with the non-monopolized ones and the plaintiff relied on the *defendant's mixed* gross profits as his measure of damages. The court allowed the mixed amount as the measure, less the leasing rental cost, relying on the equitable doctrine that the defendant's wrong caused this difficulty of proof, and therefore he should not be heard to complain of the liberality of proof. See *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2d 561 (7th Cir. 1951), cert. denied, 342 U. S. 909 (1952); also *McConnell, The Treble Damage Action, supra*, at page 668.

However, throughout this thread of liberality in the ascertainment of actual damages (with which the Court is in agreement) there is an absence of cases dealing with a fact situation as presented here because of the stipulation limiting recovery in favor of these plaintiffs to damages proximately flowing from the executive act in vetoing S. B. 615. And it is that factor, and that factor alone, which necessitates a different result in this case. It is undoubtedly true that this Court must apply the same standard to the ascertainment of the *fact* of damage as it does to the ascertainment of the *amount* of actual damage. However, superimposed upon that rule is the rule that legal injury cannot flow as a proximate result of a duly constituted legislative or executive act. A governor acting pur-

suant to his authority in vetoing a bill cannot be the proximate cause of monetary injury to a party who would have benefited by the legislation in question. And yet that is what this Court would be required to do in order to grant full compensatory damages to these plaintiffs. As has been noted, this stipulation was entered into by all counsel in the interest of a speedy determination of the issues presented at the trial as to liability only without any coercion by either the Court or opposing parties. Hence it must be read and interpreted in that posture and *in the light of the plain meaning of the words* chosen by respective counsel [fol. 173] *with due regard to the knowledge of the same counsel as to their respective theories of the case.*

It is plaintiffs' theory of the case, with which the Court is in agreement, that they may sustain their cause of action on two basic grounds—first on the basis of the defendants' wrongs done before and independent of Governor Fine's veto of S. B. 615, and that it is to redress those wrongs that this suit is brought; within that group counsel includes increased expense of operation, the loss of business and the like; secondly, that they have been injured by the fomentation of restrictive legislation, and the attempts at such, in all of the states referred to in the findings of fact. Plaintiffs, then properly conclude that their case with reference to ground one is without the protection of the *Fletcher v. Peck* type of case because such activities constitute something far and beyond mere legislation enacted in pursuance of a plan to monopolize. They then further conclude that they may also sustain their claim on the basis of the above-referred to fomentation of legislation in that it is the *attempt to influence such and the overt acts carried out in pursuance of that illegal purpose* that constitute the wrong; and the fact that some segment of the material used might not have been distorted or that it may not have actually succeeded in influencing either legislative or executive acts is immaterial. Hence, plaintiffs contend there is no need to inquire into either the legislative or executive motives to sustain their claim—first, because the activities other than legislative ones sufficiently make out their case, and secondly, because the attempts to secure such legislation and

the overt acts in pursuance of a plan to monopolize are sufficient to again sustain the cause of action independent of the real reasons for the legislative or executive acts. Again, the Court is in agreement and has sustained the cause of action on those grounds and also has found that such activity individually and/or jointly resulted in injury (fact of injury) to the plaintiffs. However, the plaintiffs seek to carry over this theory of the case into an ascertainment of actual damages caused to the individual [fol. 174] plaintiffs other than PMTA by the so-called legislative program. This the Court cannot do because the presence of the stipulation in question prevents a continuation of the application of plaintiffs' theory to a finding of actual damages flowing to the plaintiffs other than PMTA. Restated, the stipulation is as follows:

> "3. The *only* damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law of 1955." (Emphasis supplied)

There is but one logical interpretation of the words contained therein in the light of the circumstances, and that is that the damages claimed are those resulting as a proximate cause of Governor Fine's veto of S. B. 615. Further, it is clear, and has been already stated, that the stipulation in question is limited in its application to the determination of the *amount* of actual damages and has no application with respect to the *fact* of damages and injunctive relief. For that reason it has no bearing on the plaintiffs' ability to sustain their cause of action. However, the only valid interpretation of the language insofar as the *amount* of actual damage is concerned is that plaintiffs have excluded any consideration of damages flowing from the loss of good will to these plaintiffs which resulted directly from the defendants' campaign. Accordingly, they have specifically limited themselves to those damages proximately flowing from the veto of S. B. 615. The Court under the decided cases cannot award money damages for injuries proximately

resulting from a duly promulgated executive act. The basis of recovery in antitrust suits is set forth by Judge Maris in the case of *Gordon* v. *Loew's*, et al., F. 2d (3rd Cir. 1957), as follows:

> "* * * the person injured by reason of action forbidden by the antitrust laws recovers the measure of the injury to his business or property and by statutory di- [fol. 175] rection is the recipient of the punitive award. The total recovery is arbitrarily computed; it takes cognizance of the actual loss only as a base. According to the statutory direction the defendant must pay an amount three times that base."

Unfortunately, these plaintiffs are without a base. *Darden* v. *Besser*, *supra*. The damages flowing from the loss of good will other than nominal ones have been excluded, and the damages proximately flowing from an executive act are unobtainable. Hence, the Court will grant nominal damages in the sum of six cents (6¢) to each of these plaintiffs and, of course, as stated, include them within the protected group being accorded injunctive relief.

D.

Summary of Relief.

1. Injunctive relief is granted to all plaintiffs and is to run against the ERPC and all corporate defendants, including Byoir, but will exclude the individual defendants. Proposed decree will be submitted by plaintiffs as previously stated.

2. Reasonable attorney's fee and costs shall be awarded to the PMTA, and such fee and cost shall run against all corporate defendants, including Byoir, according to the ratio as set out in the succeeding paragraph. ERPC and the individual defendants shall be excluded.

3. Damages shall be awarded to the PMTA for the loss occasioned by the expenditures required because of the defendants' campaign of destruction of good will, and

as determined, trebled. Eighty percent (80%) of such damages shall be assessed against the corporate defendants other than Byoir in the manner noted, and twenty percent (20%) against Byoir, which 20% shall not be reimbursed by ERPC nor by any defendant railroad or railroads. No damages shall be assessed against the individual defendants and ERPC.

[fol. 176] 4. Nominal damages in the amount of six cents (6¢), to be trebled as provided by statute, shall be granted to each and every plaintiff other than PMTA and shall be assessed in the same manner as the damages flowing to the PMTA.

5. Testimony and evidence with respect to the attorney's fees, costs, and the damages flowing to the PMTA shall be heard at a future date to be determined by the Court.

Evidentiary Rulings.

Because of the magnitude and importance of the case the Court permitted great latitude in the introduction of evidence. The trial court in any antitrust case has wide discretion in the admission or exclusion of cumulative and collateral evidence; *U. S.* v. *General Motors*, 121 F. 2d 376 (7th Cir. 1941), cert. denied, 314 U. S. 618 (1941); *Kansas City Star Company* v. *U. S.*, 240 F. 2d 643 (1957). The evidentiary problems arising at trial may be placed in six distinct categories. The first relates to the admission into evidence, over the strenuous objection of the defendants, of proof of activities in the railroad-Byoir campaign which occurred outside of Pennsylvania. Since the conspiracy was not originated in Pennsylvania, the proof of outside activities was important, not only to show its formation but to show its method of operation, all of which had a great bearing on the fundamental question of intent and injunctive relief, if an illegal conspiracy actually existed. The complaint charged an overall conspiracy in the whole of the northeastern part of the United States. Because the plaintiffs limited themselves to proof of damages only within

the State of Pennsylvania, the defendants contend that plaintiffs should be likewise limited in proof of the conspiracy. Such result, of course, does not follow. As stated by Judge Vogel in the case of *Kansas City Star Company v. U. S., supra*, at pages 650 and 651: parties have always been allowed to "introduce evidence of other acts and doings of the party, of a kindred character, in order to [fol. 177] illustrate or establish his intent or motive in the particular act directly in judgment." And at page 651 is this pertinent language:

> "In order to show intent, it was entirely proper to receive evidence of a course of conduct engaged in by the appellants over a period of years leading up to the indictment period which might assist the jury in attempting to determine whether or not the appellants possessed that necessary intent during the time covered by the indictment. It would be illogical not to admit evidence as to a course of conduct over many years which manifested an intent to monopolize. But we need not use a rationale to explain this state of the law. The federal courts in anti-trust cases have long admitted evidence of conduct prior to the statutory period. Standard Oil Co. v. United States, 1911, 221 U. S. 1, 75-76, 31 S. Ct. 502, 55 L. Ed. 619; United States v. Pullman Co., supra; American Tobacco Co. v. United States, 6 Cir., 1944, 147 F. 2d 93, affirmed 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575."

The objection taken to the introduction of this evidence is therefore without merits

The second category relates to the offer by the defendants of statements made by public officials as to the damages caused to highways and roads by the use of the heavy truck. The Court feels that that matter was properly handled on the record; the Court holding that while the offers had some probative value, and a few such statements were actually admitted in evidence, that it would unduly burden an already extensive record by the introduction of any further documents of that nature. There was extensive scientific evidence in connection with the Maryland Road Test and other general testimony to fully cover that point.

The third question arose from the admission of testimony of the acts of the conspirators occurring after the veto by Governor Fine of S. B. 615. Again the defendants attempted to limit the proofs of conspiracy to the time [fol. 178] within which plaintiffs alleged the activities of defendants had been the cause of actual monetary damages occasioned by the veto. The evidence received as to post-veto activities was relevant evidence and admissible, if not for any other purpose, at least to establish the need for injunctive relief against the continuing activities of the defendants against the plaintiffs, which activities the Court has now declared to have been illegal. It was also relevant to show the extent of the activities of the defendants in their campaign or, in other words, to round out a true picture of the full scope of the details of the conspiracy.

The fourth question relates to the interpretation of the stipulation by Byoir referring to the authenticity and source of documents obtained from the Byoir files. It is felt also that the ruling of the Court thereon at page 2225 fully covers the question there raised. (Also see R. 122, 123, 356-362a, 528, 529, 616, 617, 622, 633, 2214-2218, 2564, 2568).

Another question which was present throughout this case was that of venue and service of process upon the Eastern Railroad Presidents Conference as an unincorporated association. From all of the evidence the Court has concluded that the activities of the association within the State of Pennsylvania were such as to justify the finding which the Court now makes that ERPC was doing business within the Commonwealth of Pennsylvania and in the Eastern District thereof sufficient to establish venue in the Court. Service upon Mr. Franklin, the then president of the Pennsylvania Railroad and a ranking member of the Conference, constituted service upon the Conference. Compare these conclusions with *Noerr Motor Freight, Inc.* v. *ERPC*, 113 F. Supp. 737, 745, 746 (E. D. Pa. 1953). Over and above that, and with the Conference fully aware that the question of venue and jurisdiction was to be determined at trial, the Conference itself joined in the filing of the counterclaim against the plaintiffs. By such action the

Conference thereby waived any objections which it might [fol. 179] have to venue or jurisdiction over the person of the association. *Freeman* v. *Bee Machine Company*, 319 U. S. 448, 453, 454 (1943); *Merchants Heat and L. Company* v. *Cloe & Sons*; 204 U. S. 286 (1907).

The final group of offers of evidence related to statistics covering the basic construction of roads in the northeastern section of the United States; the use given such roads by the trucks using the highways in interstate commerce; the amount of destruction caused by such trucks, including certain specific instances in different sections of the country; the increasing cost of maintenance; the increasing cost of construction of roads and with particular reference to the changing geometric designs of the roads, all said to be caused by the increasing size of trucks and the greater weight of trucks. The defendants offered to prove by the use of experts in the highway and traffic fields that in the opinion of the experts the trucks did not pay their fair share of the cost of the foregoing and that thereby the trucking industry was receiving enormous subsidies at the hands of the taxpaying public. In the offer of proof it was averred that these experts would testify that should the trucking industry pay what in the opinion of the experts were, fair "user charges", the cost of operation of the trucking industry would immediately rise some 4% to 6%. This entire line of testimony was excluded by the Trial Judge for many reasons among which are: (1) There was ample proof in the record that heavy trucks, along with other factors, do constitute *one* of the main causes in the breaking up and deterioration of the already constructed highways; (2) that such proofs would not justify or be a defense to the railroad-Byoir combination to destroy the trucking industry as such. Again, it may be remarked that this is not a suit between either the United States or any State against the trucking industry itself. In such a suit the question of public welfare would undoubtedly play a large part. The railroads throughout this case have attempted to label themselves as the guardians of the public welfare. [fol. 180] They attempted to convince the Court that it should so consider the railroads in their activities against the truckers. The answer to that proposition is self-evident.

The railroads assisted by Byoir inaugurated and carried out their campaign to effectively limit and if possible destroy the trucking industry as a competitive factor in the long-haul transportation industry to preserve and increase their dollar volume of business; (3) there was ample evidence heard by the Court, sitting as a jury, with respect to these factors in connection with the highly scientific evidence surrounding the Maryland Road Test, in addition to the extensive evidence heard on these and analogous subjects when the defendants presented their proofs concerning the Pennsylvania situation. In that posture, and in the light of the entire record, the probative value of the evidence would not have warranted the time that would have been expended in further burdening an already lengthy record.

The Court, therefore, is of the opinion on a review of the entire case that the rulings made are consistent with the rules of evidence applicable in the Courts of the United States.

RULINGS ON REQUESTS.

The Court will now proceed to rule upon plaintiffs' and defendants' requests for findings of fact and conclusions of law. These requests in each instance will be "affirmed", "denied", or "refused as stated". In passing upon these requests the Court has found many of the defendants' requests, which while they contain substantially accurat statements of some of the facts established at the trial, nevertheless, attempt to link the activities of Charnay, after he was employed to offset the railroad activities, with isolated instances of defensive actions of the truckers prior to Byoir's entrance into Pennsylvania in the year 1951. By so doing they attempt to show a conspiracy of the truckers against the railroads. In this respect their proofs fail to convince the Court. I find no connection between [fol. 181] the isolated defensive actions by the defendants prior to Byoir's entry into Pennsylvania and the formal Pennsylvania defensive campaign initiated by Charnay after the truckers realized what the railroads had been doing. Since I have found that the truckers were not en-

gaged in a conspiracy against the railroads in violation of the antitrust statutes, such requests cannot be affirmed.

The following plaintiffs' Requests for Findings of Fact are AFFIRMED:

Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 31, 32, 33, 34, 35, 36, 37, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 55, 56, 58, 59, 60.

Request No. 16 is modified by the deletion in line three of the words "and thereby procuring legislation", and the insertion after "public opinion" in line three of the following phrase: "Hostile to the trucking industry thereby destroying its good will with the public and thereafter attempt to secure legislation"; and as so modified is AFFIRMED.

Request No. 28 is modified by the insertion of the following sentence at line eleven after the words "Harpers, October, 195_": "With regard to the last named article defendants furnished for the use of the author extensive research material only and had no part in either the writing or editing of said article"; and as so modified is AFFIRMED.

Request No. 30 is REFUSED AS STATED.

Request No. 38 is modified by the deletion at line five of the words "because of its inaccuracy" and the insertion of the words "because it was in a final report"; and as so modified is AFFIRMED.

Request No. 40 is modified by the deletion at line five of the words "and are still" and the insertion of the words "and even after the veto of S. B. 615 were still"; and as so modified is AFFIRMED.

Requests Nos. 52, 53 and 54 are DENIED.

[fol. 182] Request No. 57 subparagraphs (a), (b) and (d) are REFUSED AS STATED.

Request No. 57 subparagraphs (c), (e) and (f) are AFFIRMED.

The following plaintiffs' Requests for Conclusions of Law are AFFIRMED:

Nos. 1, 2, 3, 4, 5, 6, 8, 9, 11, 12, 13, 16, 17, 18.

Request No. 10 with the insertion before the words "the means" in line one of the words "one of"; and as so modified is AFFIRMED.

The following plaintiffs' Requests for Conclusions of Law are DENIED:

Nos. 7, 14 and 15.

The following defendants' Requests with respect to plaintiffs' case are AFFIRMED:

Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 29, 31, 32, 37, 39, 44, 46, 47, 48, 50, 51, 52, 53, 56, 57, 59, 60, 62, 63, 64, 65, 66, 70, 74.

Request No. 22 with the addition of the words "as public relations counsel to put the projected railroad campaign into effect" after the word "retained" at the end of line four; and as so modified is AFFIRMED.

Request No. 30 with the deletion of the words "in the matter of rates" at lines three and four; and as so modified is AFFIRMED.

Request No. 35 with the deletion of the words "who would be able to counteract PMTA publicity" at lines seventeen and eighteen, and the insertion in lieu thereof the words "to assist that group in carrying out defendants' program already in operation"; and as so modified is AFFIRMED.

Request No. 49 with the deletion of the words "to be issued as a press release" in lines fourteen and fifteen and [fol. 183] the insertions in lieu thereof of the words "for discussion"; and as so modified is AFFIRMED.

Request No. 55 with the addition of the phrase at the end thereof: "and was so treated and regarded by the Bureau of Public Roads"; and as so modified is AFFIRMED.

Request No. 67 with the addition of the following sentence at the end thereof: "The memorandum was based partly upon questionable statistics furnished the department by Marine of Byoir on behalf of the railroads."

The following defendants' Requests for Findings of Fact with respect to the plaintiffs' case are REFUSED AS STATED:

Nos. 14, 17, 18, 27, 40, 41, 45, 54, 68, 69, 71, 73.

The following defendants' Requests for Findings of Fact are DENIED:

Nos. 13, 15, 16, 19, 20, 21, 23, 24, 25, 26, 28, 33, 34, 36, 38, 42, 43, 58, 61, 72, 75, 76, 77, 78, 79, 80, 81, [illegible].

The following defendants' Requests for Conclusions of Law with respect to plaintiffs' case are REFUSED AS STATED:

Nos. IV and V.

The following defendants' Requests for Conclusions of Law with respect to plaintiffs' case are DENIED:

Nos. I, II, III, VI, VII, VIII, IX.

The following defendants' Requests for Findings of Fact in relation to defendants' counterclaim against plaintiffs are AFFIRMED:

Nos. 1c, 2c, 3c, 4c, 5c, 6c, 7c, 8c, 10c, 11c, 12c, 13c, 14c, 15c, 16c, 17c, 18c, 20c, 25c, 26c, 27c, 29c, 31c, 32c, 33c, 35c, 36c, 37c, 38c, 39c, 41c, 42c, 43c, 48c, 54c, 72c, 73c, 75c, 76c, 82c, 83c, 84c, 85c, 86c, 87c, 89c, 90c, 91c, 92c, 93c, 94c, 96c, 97c, 98c, 99c, 100c, 101c, 102c, 104c, 106c, 107c, 108c, 109c, 110c, 111c, 112c, 113c, 114c, 115c, 116c, 117c, 118c, 119c, 120c, 121c, 122c, 123c, 124c, 125c, 126c, 142c, 144c, 145c, 146c, 147c, [fol. 184] 148c, 149c, 151c, 152c, 153c, 154c, 155c, 156c, 157c, 158c, 159c, 162c.

Request No. 24c with the addition of the following sentence at the end thereof: "The cost of financing the present action was included in the above stated sums."; and as so modified is AFFIRMED.

Request No. 28c with the addition of the following sentence at the end thereof: "The main purpose in the year 1952-1953 of solicitation of funds was to combat the railroad program against the truckers waged over the prior three-year period."; and as so modified is AFFIRMED.

Request No. 30c with the deletion of the words at lines three and four: "to mete out rewards and punishments to them"; and as so modified is AFFIRMED.

Request No. 40c with the deletion of the words at lines five and six: "thus enabling plaintiffs to divert business from counterclaimants."; and as so modified is AFFIRMED.

Request No. 44c with the deletion of the words at lines four and five: "in the matter of rates"; and as so modified is AFFIRMED.

Request No. 57c with the addition of the following sentence at the end thereof: "This action was taken by the plaintiffs after the discovery and expose of the railroad-Byoir campaign against the truckers."; and as so modified is AFFIRMED.

Request No. 143c with the addition of the following sentence at the end thereof: "All such attempts were subsequent to the railroad-Byoir antitruck campaign."; and as so modified is AFFIRMED.

Request No. 150c with the addition of the following sentence at the end thereof: "This attempt to secure criticism of road tests occurred after the Byoir connection with the Maryland Road Test and the antitruck campaigns in [fol. 185] Ohio and Pennsylvania on behalf of the railroads by Byoir had been revealed to the truckers."; and as so modified is AFFIRMED.

The following defendants' Requests with respect to the counterclaim are REFUSED AS STATED:

Nos. 21c, 22c, 34c, 46c, 47c, 49c, 50c, 52c, 53c, 55c, 56c, 58c, 59c, 60c, 61c, 62c, 63c, 64c, 65c, 66c, 70c, 71c, 74c, 78c, 79c, 80c, 81c, 95c, 103c, 105c, 127c, 128c, 129c, 130c, 131c, 132c, 133c, 134c, 135c, 136c, 137c, 138c, 160c, 161c.

The following defendants' Requests with respect to the counterclaim are DENIED.

Nos. 9c, 19c, 23c, 45c, 51c, 67c, 68c, 69c, 77c, 88c, 139c, 140c, 141c, 163c, 164c, 165c, 166c, 167c.

Defendants' Request for Conclusions of Law No. Ic is AFFIRMED.

Defendants' Requests for Conclusions of Law Nos. IIc, IIIc, IVc, and Vc are DENIED.

Two further sets of requests for findings of fact and conclusions of law have been submitted for consideration by the Court. The first are plaintiffs' requests for findings in opposition to defendants' counterclaim, and the second are requests for findings submitted by certain individual defendants enumerated in paragraph 6 under the heading "Defenses". All of these requests have been considered by the Court and since the Court is of the opinion that it has fully covered the first set of requests under the heading "Counterclaims" and the second set of requests in paragraph 6 under the heading "Defenses", these requests will not be specifically answered.

To the extent that the language of any of the requests which have been affirmed by the Court may be inconsistent with the narrative findings of fact and conclusions of law made by the Trial Judge in the course of this opinion, the language of the opinion shall prevail.

[fol. 186]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FINAL DECREE—July 22, 1958

This cause having been tried before the Court without a jury, the Court having determined upon consideration of the record that the plaintiffs are entitled to damages and injunctive relief against the Eastern Railroad Presidents Conference and all corporate defendants, and the Court having filed its Opinion to that effect herein on October 10, 1957;

Now, Therefore, after hearing plaintiffs and defendants by their attorneys, it is hereby

Ordered, Adjudged and Decreed as follows, as to

I.

INJUNCTIVE RELIEF

(A) "Plaintiffs" means the following parties plaintiff, their successors and assigns:

Noerr Motor Freight, Inc.
Kramer Bros. Freight Lines, Inc.
McLean Trucking Company
Lansdale Transportation Co., Inc.
T. M. Zimmerman Company
W. I. Womeldorf & Sons Company
Rodgers Motor Lines, Inc.
Akers Motor Lines, Inc.
Keystone Lawrence Transfer & Storage Company
W. J. McCormick Truck Transportation
Martin Brothers
Pennsylvania Transfer Company
F. W. Lusk Transfer Company
Davidson Transfer & Storage Company
Suwak Trucking Company
C. W. Dillie
[fol. 187] A. W. Bauman, Jr. Trucking Company
Martsolf Bros.
Spector Motor Service, Inc.
G. C. Braden Trucking Company
Edward G. Horn Trucking Co.
Seaboard Tank Lines, Inc.
Friedman's Express, Inc.
Karn's Transfer, Inc.
Lombard Bros. Incorporated
Lester C. Newton Trucking Company
Pennsylvania Motor Truck Association (PMTA),
Plaintiffs.

D. F. Bast
Ed. Chadderton Trucking
Cooper-Jarrett, Inc.
Eastern Freight-Ways, Inc.
Fowler & Williams, Inc.
William F. Crossett, Inc.

Fischbach Trucking Co.
Hall's Motor Transit Co.
Mushroom Transportation Co., Inc.
Miller Motor Express, Inc.
Yale Transport Corporation
Daily Motor Express
McCullough Transfer Co.
York Transportation Co.,

Intervening Plaintiffs.

Other members of plaintiff PMTA
engaged in long-haul trucking

(B) "Defendants" means the following parties defendant, their successors and assigns:

Eastern Railroad Presidents Conference
Pennsylvania Railroad Company
New York Central Railroad Company
[fol. 188] Chesapeake & Ohio Railway Company
Norfolk & Western Railway Company
Baltimore & Ohio Railroad Company
Reading Company
New York, New Haven & Hartford Railroad Co.
Lehigh Valley Railroad Company
Lehigh & New England Railroad Company
Delaware, Lackawanna & Western Railroad Co.
Delaware & Hudson Railroad
Erie Railroad Company
Western Maryland Railway
Pittsburgh & West Virginia Railway
New York, Chicago & St. Louis Railroad Co.
Boston & Maine Railroad
Central Railroad Company of New Jersey
Central Railroad Company of Pennsylvania
Maine Central Railroad Company
New York, Ontario & Western Railway
Lehigh & Hudson River Railroad
Union Railroad Company (Pittsburgh)
Canadian Pacific Railway Company
Canadian National Railways
Carl Byoir & Associates, Inc.,

Defendants.

(C) "Person" means any individual, corporation, partnership, association, or other business or legal entity.

II

The provisions of this Final Injunction applicable to and defendant shall apply to such defendant, its officers, agents, servants, employees and attorneys, and to all other persons acting or claiming to act under, through, or for such defendant, who shall have received actual notice of this Final Injunction by personal service or otherwise.

[fol. 189]

III.

Defendants have violated Sections 1 and 2 of the Act of Congress, of July 2, 1890, 15 U. S. C., Sections 1 and 2, entitled "An act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act. Said violations have consisted of defendants' engaging in an unlawful combination and conspiracy in unreasonable restraint of trade and commerce among the several states and in an unlawful combination and conspiracy to monopolize trade and commerce among the several states, with the intent and object of substantially lessening competition in and monopolizing the long-haul transportation of freight, to the irreparable injury of the public and of the plaintiffs, whose business defendants intended to restrain and restrict to the greatest extent possible, with the ultimate object of driving them out of the long-haul transportation industry. Defendants have sought to achieve this object primarily by campaigns of vilification and harassment designed to destroy the business good will of the long-haul truckers, including plaintiffs, and to cause to be imposed upon them burdensome governmental restrictions and taxes. Defendants have concealed their part in instigating and supporting such campaigns.

IV.

(A) Defendants are jointly and severally enjoined and restrained from combining or conspiring with the intent and object of restraining, restricting, limiting or preventing the existence, growth, development, or expansion of the

business of plaintiffs, or competition by plaintiffs with defendants, or any of them, in the long-haul transportation of freight, by directly or indirectly doing or causing to be done any of the following acts:

(1) Seeking to create resentment or hostility to plaintiffs in the minds of the general public.

[fol. 190] (2) Seeking to create resentment or hostility to plaintiffs in the minds of those persons who utilize or may utilize the services of plaintiffs' trucks and in such a manner as to interfere with business relations between shippers and plaintiffs.

(3) Seeking to create resentment or hostility to plaintiffs in the minds of legislators, law enforcement officers, or other public officials or members of any branch of government.

(4) Publishing or causing the publication or dissemination of false, defamatory or derogatory material with regard to plaintiffs or their business.

(5) Instigating, preparing, composing, publishing, producing, disseminating, paying for or subsidizing any release, article, report, statistics or other publication, or any motion picture, radio or television presentation, or any other material relating to plaintiffs or their business without disclosing to the reader or viewer that it has been instigated, prepared, composed, published, disseminated, produced, paid for or subsidized by or on behalf of defendants.

(6) Seeking out or creating organizations apparently independent of defendants to carry out any activity prohibited by this Final Injunction without publicly disclosing the relationship between defendants and such organizations.

(7) Employing or contracting with any public relations firm or similar organization to carry out or cause to be carried out any activity prohibited by this Final Injunction.

(8) Making payments, whether by way of salary, expenses, or of any other nature, to any official, officer, employee or consultant of any governmental, public or private body or organization to carry out, in the name of such

person, governmental, public or private body or organization, any activity prohibited by this Final Injunction.

(9) Sponsoring, instigating or supporting any legislation for the enactment of ton-mile, weight-distance, high-[fol. 191] way or other taxes of any kind to be levied on plaintiffs or their business, or weight, size or other truck limitations, or opposing legislation repealing such existing taxes or truck limitations, unless such opposition be openly and publicly made in the name of the defendants or any of them.

(B) Activities affecting plaintiffs prohibited herein in this Paragraph IV shall be deemed to include (1) those activities specifically directed against plaintiffs by name, and (2) those generally directed against long-haul truckers as a group or against other specific persons in the long-haul trucking business in so far as they affect plaintiffs because they affect the group (long-haul truckers) of which plaintiffs are a part.

V.

Nothing contained in this Final Injunction shall be construed to prohibit defendants from seeking to change or improve their own facilities, services or rates to make such facilities, services or rates more attractive to shippers, nor from seeking legislative, administrative or other governmental benefits for themselves, as distinguished from imposing burdens on plaintiffs. Nor shall anything contained in this Final Injunction be construed to prohibit defendants from appearing before any legislative, administrative or other governmental body to point out the effect upon the railroad industry of the enactment of any legislation or administrative rulings which may be designed to aid the plaintiffs, but which would adversely affect the defendants.

VI.

Jurisdiction of this cause is retained for the purpose of enabling any party in interest to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this injunction, for the purpose of the enforcement

[fol. 192] of compliance therewith and for the punishment of violations thereof.

VII.

It is hereby Further Ordered, Adjudged and Decreed as to

Damages.

that judgment be entered in favor of plaintiff Pennsylvania Motor Truck Association (PMTA) and against all the defendants, jointly and severally, in the amount of $652,074.00 (single damages $217,358.00—trebled, as required by statute).

Further, that judgment be entered in favor of all the named plaintiffs in Paragraph I (A) of this Final Decree, other than Pennsylvania Motor Truck Association (PMTA), and against all the defendants, jointly and severally, in the amount of eighteen cents (18¢) each (nominal damages of six cents (6¢) each—trebled, as required by statute).

VIII.

It is hereby also Further Ordered, Adjudged and Decreed, as to

Counsel Fee.

that the defendants pay to plaintiff Pennsylvania Motor Truck Association (PMTA) as a reasonable counsel fee, under the provisions of Section 15, Title 15 U. S. C. A., the sum of Two Hundred Thousand ($200,000.00) Dollars.

By the Court:

Thomas J. Clary, *J.*

Dated at Philadelphia, Pennsylvania this 22nd day of July, 1958.

[fol. 192a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 192b] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,751

NOERR MOTOR FREIGHT, INC., et al.,

v.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,
Appellants.

Appeal From the Orders of the United States District Court for the Eastern District of Pennsylvania, Dated July 22, 1958 and July 31, 1958.

Appellees' Appendix—Filed February 24, 1959

[fol. 193]

IN UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF PENNSYLVANIA

Transcript of Proceedings

REYNOLDS GIRDLER.

Direct examination.

By Mr. Kohn:

Q. Mr. Girdler, by whom were you employed during the period 1949 to 1952?

A. By Carl Byoir & Associates.

Q. In what capacity?

A. As an account executive on the Eastern Railroad Transportation Committee account.

Q. What are the duties of an account executive?

A. General supervision of the account, maintenance of liaison with the client, carrying out of the work assigned by the client, duties expected of you, and general supervision of the account.

Q. For all practical purposes you are the manager of that account?

A. Yes, sir.

Q. And you are in charge of it with the exception of whatever consultation you may see fit to have with only, really, the two top officers of the company, Mr. Byoir and Mr. Swinehart; isn't that right?

A. And Mr. Hammond.

Q. He was vice-president?

A. Yes, sir.

Q. But you had this segment of the business under your control?

A. That's right.

* * * * * * *

[fol. 194] Q. Mr. Girdler, was it your undertaking that the policy which you, your company working for the other defendants here was to promulgate as the ideal or desirable national transportation policy, was air lines for speed, trucks for short hauls and railroads for long hauls. That is what you were hired to do?

The Court: You may answer it.

The Witness: Thank you.

Within the limits of the abbreviated, necessarily abbreviated line here, yes, sir.

By Mr. Kohn:

Q. Now, you state on the second page of this document:

> "The railroads can haul 100,000 tons of freight from coast to coast at a cost of 3,500 man-days of labor. It takes 90,000 man-days to do the job by truck and 50,000 man-days by plane."

Was that information correct?

A. Certainly at the time that I wrote it I assumed it to be correct, because I am sure that it was obtained from sources that I believed to be reliable.

Q. And do you now believe that that was correct?

A. I have no, in the intervening years I have had no reason to see anything which would dispute it. I am not an expert at the moment, or even then.

Q. But as far as you know, that information is accurate and you would be willing to stand by it?

A. As far as I knew, yes, sir. It was obtained from some basic document that we had at hand at the time.

Q. And when I say you I mean Byoir.

A. Yes, sir. We all looked at the material on the account, that is.

Q. I call your attention to the bottom of page 6. Is it correct that you as account executive responsible for this account at Byoir stated:

> "You can see from the foregoing that this account is utterly unlike the conventional one. Here we do not [fol. 195] have a client for attribution. Of course, we will release some stories under client attribution, but they will be of lesser propaganda importance than those we can generate from motorists, property owners, taxpayer, farmer or women's groups. In sum, we not only have to create publicity ideas; we also have to go out in the field and create the groups and occasions so that those publicity ideas will become realities."

And you so stated to your associates and department heads at or about the time you began to work on this account?

A. That is right.

Q. Then I call your attention to the third paragraph on page 7 and ask you if that correctly states your instructions.

> "One more word: If you are asked about the nature of our work for the railroads, you need only say that we are trying to develop a public relations program to speed the adoption of a more modern, enlightened national transportation policy as already defined by Congress and two presidents."

A. Yes, sir.

• • • • • • •

Q. Now, do you recall those were covering letters, were they not, in which you sent out Exhibit 24, the statement of objectives about which we were talking this morning before lunch, and you state as follows:

> "At the suggestion of Mr. Thomas J. Deegan, Jr., Chairman of the Public Relations Committee of the Eastern Railroad President Conference—Transportation Committee, we are attaching a copy of the brief memorandum prepared for the guidance of the department heads of Carl Byoir & Associates, Inc.
>
> "Since the memorandum was prepared for internal consumption only and was confidential to our department heads, it is somewhat informal in tone. However, [fol. 196] we hope it will give you a better idea of the task for which we have been retained and of our proposed methods for carrying out that task."

Now, do you recall letters similar to this were sent to all of the railroad presidents, and as a matter of fact, as appears from the letters to Ross and Littlefield, to the assistants and public relations people who participated in the Eastern Railroad Presidents Conference meeting and this program with the presidents?

A. (Witness nodding)

Q. Would you please say yes or no?

A. Yes.

Q. It is hard for the reporter to catch it otherwise.

A. Oh, I am sorry. Yes.

Q. Now, you had a pretty good response, didn't you, to these letters?

A. I can't remember whether I did or not. I think I got a few—I can remember getting a few letters back commenting on it, but how many really I don't know, Mr. Kohn.

Q. Well, let's just take one. Do you know Mr. Franklin, who he is?

A. I know who he is, yes, sir.

Q. Who is he or was he?

A. At that time he was the president of the Pennsylvania Railroad.

Q. An active member of the Conference?

A. Yes, sir.

. . . . . .

Mr. Kohn: Would you please mark with the next number, P-26, a 2-page letter from the Pennsylvania Railroad Company to Mr. Girdler dated October 6, 1949.

By Mr. Kohn:

Q. That is Mr. Walter S. Franklin, the president on October 6, 1949, of the Pennsylvania Railroad?

A. Yes, sir.

[fol. 197] Q. This is a letter to Mr. Reynolds Girdler of Carl Byoir on the stationery of the Pennsylvania Railroad Company, signed by Mr. Franklin, the president himself, dated October 6, 1949.

Incidentally, I note that although he was in Washington at the time he felt sufficiently important to reply to you that he replied from Washington, D. C. instead of from his regular office here in the Broad Street Station Building; is that correct?

A. Well, it is a point that certainly I missed at the time.

Q. Well, look at it.

A. Yes, yes, yes.

Q. And he said—

A. That is the first time I recognized that.

Q.

"I have read with interest the memorandum attached to your letter of October 4. While you have touched upon enforcement of the law covering speed, weight restrictions, etc., as applicable to the big trucks, I do not think you have emphasized this phase"—

And he wrote in the word "in" in his own handwriting, didn't he?

"—in what I hope may be covered by your publicity release—to the extent that it is justified.

"It has only been within the last few months that any attempt has been made to enforce weight regulations. Excessive weights have greatly added to the damage of roads. In certain states trucks are only allowed a speed of 30 miles per hour. Truck owners

will confirm the fact that their drivers do not pay the slightest attention to this restriction, and your experience on the highways will also confirm this. When and as you approach the remedies, I think you should emphasize that many truckers are perfectly willing to pay fine of $50 for excess weight, and do so whenever they have been stopped. The excess revenue more than [fol. 198] justifies the small fines which, from a practical standpoint, are ignored.

"If the loading of excess weights is to be stopped, fines will have to be increased, but it would be far better to follow the usual practice applied to drivers licenses, that is, where there is more than one offense, to suspend the truck license for a period of a month or more. The suspension of the driver's license would be similar to the slight fine now applied, but a suspension of a truck license"—

And he underlines the words truck license

"—prevents that truck from operating in that state and would obviously materially reduce the earnings."

That is, the earnings of the trucker.

"We are very much interested in the progress of your efforts, and I hope that these suggestions may be given consideration."

Now, do I understand from this letter that it was your understanding at that time that Mr. Franklin, on behalf of the Pennsylvania Railroad, approved the objectives as embodied in the memorandum and, in addition, had this other suggestion of his own to add?

Mr. Price: Objection.

A. Yes, sir, it was.

. . . . . .

Q. Who is Mr. Littlefield?

A. Mr. Littlefield was an employee of the Pennsylvania Railroad, and as I remember, he was a chairman of the Research Committee, which was one of the three committees to which we reported.

Q. In other words, he was the Pennsylvania Railroad representative on one of the subcommittees of the ERPC, to whom Byoir reported in the course of this project?

A. Yes, sir, yes, sir, that's right.

[fol. 199] Q. I note here on the letterhead that he was referred to on the railroad stationery as the general tax agent.

A. Yes.

Q. Now, Mr. Girdler, he says to you the following, does he not:

"Yours of October 4th."

And he is referring once again to the memorandum Exhibit P-24.

"Over the weekend, I read your memorandum to department heads and it is most refreshing. For fifteen years I have devoted more or less time to this subject, but rarely found anyone inside or outside of the railroad fraternity who had the time to seriously study all phases of this complicated problem."

Now, let me interrupt. Did you know that Mr. Littlefield during that 15 years was one of the witnesses before the Wheeler Committee whose report we referred to briefly when we were in court this morning?

A. No, sir, I did not.

Q. "Your overall approach is broad and constructive, and the following is not criticism but suggestions that may avoid complications later on:

"Page 2"—

And he quotes from your memorandum as follows:

" 'But they represented an outright gift to the trucking industry of free roadways over which they could do business at public expense.' "

And he says:

"The trucking industry will give you a pretty warm argument on this point inasmuch as they do pay a very

substantial amount in the form of motor vehicles taxes which are, as you know, earmarked for highways in 21 states. You have plenty of arguments to show that they are not paying their fair share of these highways [fol. 200] and are contributing, in many cases, nothing, and in other cases, very little, in the way of honest-to-goodness taxes for the general functions of government other than highways."

"Page 2"—

He quotes again from your memorandum:

"'But with the outbreak of war, as you all know, the trucking industry practically collapsed as a transportation agency.'"

He says:

"As a long-haul transportation agency it certainly did very nearly collapse. It was unable to take any part of the tremendously increased freight brought about by the war. However, I hope your staff will appreciate that there must be some difference between long-haul over-the-road trucking and short-haul trucking in local and municipal areas. The short-haul truck increased greatly during the war because here the truck could do a job better than any other form of transport. For example, we found that the convoys were going out light from New York because the floating conditions were such in New York harbor that we could not move the freight across the harbor fast enough. To remedy this, fleets of trucks were employed by all railroads to move large tonnage through the tunnels and avoid the floating problem. The Pennsylvania alone trucked as much as 100 carloads a day from the Jersey side to piers throughout greater New York."

Now, does that indicate to you that Mr. Littlefield was again making the point that we discussed this morning, that trucks were all right for short haul but they were not to be used for long haul?

A. Of course, both short haul and long haul are comparative terms, Mr. Kohn, and I don't know precisely what [fol. 201] he had in mind as a precise definition of short haul as compared to long haul.

Q. You used the term short haul and long haul too at your work, did you not?

A. Yes, sir.

Q. What does it mean to you, short haul and long haul?

A. Well, as I remember it, as a matter of fact, in some instances, obviously, 50 miles is a short haul, but in other instances 500 could also be an economic distance for a truck to run.

Q. Is that the best definition you can give us of the term short haul and long haul at this time?

A. Yes, sir.

Q. Well, is there any difference between the two in your mind, other than what you have just told us, that you can now tell us?

A. Any difference between—

Q. Between short haul and long haul?

A. No, sir. What I am trying to say is that they are both comparative terms, and depending upon the circumstances—I am no transportation expert—but depending upon the circumstances, a 500-mile trip by a truck might be an extremely efficient operation.

Q. Would it be fair to say that the circumstance which governs is that when the railroad thinks that it should or could carry the particular item it becomes long haul and if the railroad thinks it should not, then it is short haul?

A. I think that is a fair statement. I imagine the reverse is true from the other side.

Q. So that you understood Mr. Littlefield to be stating that a distinction should be based on the test to which we have just referred? I think that is clear, is it not?

(No answer.)

* * * * * * *

Redirect examination.

Q. Mr. Girdler, yesterday you were asked about Exhibit P-24 and you testified with regard to the paragraph in

[fol. 202] which it was stated, "Congress itself has declared the national policy . . ."

Do you remember that by Mr. Price? Do you see the paragraph I am referring to?

A. Yes, sir.

Q. Would you tell us, please, what was the policy declared by Congress?

A. The way I stated it at that time, and obviously the impression that I had as to the national policy as stated by Congress, and as set forth with particularity, as I recall, in a new book that the Brookings Institute had at that time issued on the question of national transportation, was summed up in very abbreviated form—assignment of that portion of the transportation burden to the agency best fitted for it, with equality of treatment for all, just as I stated it here.

Q. Is that the entire policy of Congress, or can you make it more specific?

A. Oh, no, sir. You certainly could not, in a thing like this, as simple and short and informal a memorandum as this was originally supposed to be, sum up the entire national transportation policy or describe it adequately in a few short sentences.

Q. Well, was it Congress' policy that the airlines be used for speed, that the trucks be used for short hauls, and the railroads for long hauls?

A. That was my impression of the national transportation—as I believe at that time—the last time it had been stated was sometime in 1944, once again within the abbreviated small space that was available for this sort of thing. It was a very short version of it, and certainly not adequate to all the nuances and fine distinctions which were treated a great deal more thoroughly, naturally, in this book.

Q. But, in essence, that was the Congressional policy, airlines for speed, trucks for short hauls, and railroads for long hauls?

[fol. 203] A. That was the impression that I was under at the time, certainly, yes, sir.

Q. And it was the purpose and object and intent of the defendants here to carry out that policy?

A. As we understood it, yes, sir.

Q. So that your efforts were then directed toward that end in this Eastern Railroad Presidents Conference project?

A. Yes, sir.

Q. And in doing the things you did, some of which you discussed, and in seeking the measures which you sought, such as the weight restrictions and the ton-mile tax and state taxes, and so on, you did those things, the defendants here did those things for the purpose of carrying out that purpose?

Mr. Price: That is objected to.

Mr. Rhoads: Objected to.

The Court: Read the question back, Mr. Bosta.

(Last question read.)

The Court: I will overrule the objection.

The Witness: These things were—

By Mr. Kohn:

Q. Well, I think you can answer it, if you will, please, yes or no, and then make any explanation you want.

A. Yes. Within the—with the realization that what we were seeking in our interpretation of the national transportation policy was equality of opportunity for the railroads, an equality which we did not believe they then enjoyed by reason of the subsidies which the railroads considered the truckers were obtaining."

. . . . . .

[fol. 204] C. COLBURN HARDY.

Direct examination.

By Mr. Kohn:

Q. Now, the second objective as stated there was read to you before as being to split the trucking industry by isolating long-haul trucks. Now, would you read the (a) and (b) under that heading.

A. Yes, sir.

"(a) By neutralizing industrial opposition through support from tax-conscious executives as opposed to traffic managers.

"(b) By building public support through all media: press, radio, speeches, and so forth."

Q. Now, going back to the heading to split the trucking industry by isolating long-haul truckers, what was the purpose of that?

A. As was reported in the tax policy report, the problem of New Jersey was that it is a bridge state, that a vast amount of the heavy-truck traffic on its highways comes from out of state and that these trucks do not then pay their fair share of the cost of the highways which they use. So in New Jersey it was a very difficult problem, as it is pointed out.

Now, the New Jersey trucks, however, and especially the coal truck and bakery truck, and the normal vehicle which we see, frequently did pay a substantial fee for its license plates and its gasoline, and those funds went into the general treasury, from which the money was taken to maintain and build the highways.

So there were, as this report strongly points out, two, almost two different segments of the trucking industry, and we wanted to point out the facts as told in this report.

Q. That is what you meant by isolating—

[fol. 205] A. Yes, sir.

Q. —the long-haul trucking industry and separating them from the other local trucking business?

A. Yes, sir.

• • • • • • •

WILLIAM WHITE.

Direct examination.

By Mr. Kohn:

Q. What is your full name?

A. William White.

Q. What are you doing now, Mr. White? What is your occupation? What job do you have?

A. I am president of the Delaware and Hudson Company and the Delaware and Hudson Railroad.

* * * * * * *

Q. How long have you held your position as president of the Delaware and Hudson?

A. Two years October 1.

Q. October 1, 1953?

A. 1954.

Q. What did you do before that?

A. I was president of the New York Central.

Q. How long were you president of the New York Central?

A. Slightly less than two years.

Q. What did you do before that?

A. I was president of the Delaware, Lackawanna & Western for eleven and a half years.

Q. These railroads are members of the Eastern Railroad Presidents Conference, are they not?

A. Yes.

[fol. 206] Q. And as their president you have been continuously a member of the Eastern Railroad Presidents Conference for approximately the last what, fifteen or sixteen years?

A. Since January 1, 1941.

* * * * * * *

Q. What was referred to by the Byoir people as the five percenters?

A. I don't know what the Byoir people referred to. I heard that 5 percenter thing the first time when I was being questioned by Mr. Dilworth three and a half years ago.

Q. Are you sure you didn't read it among the Saroyan papers some time before Mr. Dilworth questioned you?

A. If it was in the Saroyan papers, I just don't recall. But, certainly, the large trucks in long-haul freight traffic business didn't amount to more than about 5 per cent of the total of motor traffic on the highways. If you wish to refer to them as the 5 percenters, I am perfectly willing to term them 5 percenters so that there will be no confusion here in the record.

Q. I have no desire to refer to them as 5 percenters. The question was, didn't you recall that Byoir referred to them as 5 percenters.

A. Byoir may have.

Q. Well, weren't they the primary target of this first campaign or project with the Eastern Railroad Presidents Conference and Byoir?

A. Yes, I think so.

Q. And what you wanted to do was to get them subjected to higher taxes?

A. I have previously answered that question, Mr. Kohn, that we certainly thought, and we still think, that they should pay a higher user charge for the use of public facilities which they use for commercial enterprise.

Q. And that higher user charge would be a ton mile or weight distance tax; is that correct?

A. It may take that form, yes.

[fol. 207] Q. Well, it did take that form in New York, did it not, in 1951?

A. Yes, it did.

Q. And you and the Eastern Railroad Presidents Conference and Byoir played an active part in getting that tax enacted, did you not?

A. I think the answer to that is yes.

* * * * * * * *

THOMAS J. DEEGAN, JR.

Direct examination.

By Mr. Kohn:

Q. Mr. Deegan, by whom are you employed?
A. The New York Central System.
Q. And they are one of the defendants here?
A. Yes, sir.
Q. In what capacity are you employed by them?
A. I am vice-president, staff.
Q. I beg your pardon?
A. Vice-president, staff.
Q. How long have you been with the New York Central?
A. September 14, 1954.
Q. And with what railroad were you before that?
A. I was vice-president and a director of the Chesapeake & Ohio Railway Company.
Q. Vice-president there of what?
A. Passenger service and public relations.

• • • • • • •

Q. When did your contact with ERPC begin?
A. When I was an officer of the C & O.
Q. When was that?
A. Well, it began in 1949.
Q. June?
A. Yes, sir.

[fol. 208] Q. And what was your association with the ERPC at that time?

A. I was designated by the Conference as chairman of a subcommittee of the Competitive Transportation Committee, the Subcommittee on Public Relations.

Q. Was it one of your early duties to obtain the services of an outside public relations firm to carry out the objectives of the Transportation Committee?

A. Yes, sir.

• • • • • • •

Q. Was there any discussion among the members of your committee with regard to the subject of the campaign, the

program that you were then engaged in with Carl Byoir that we have been discussing here?

A. Yes, sir.

Q. And it related to the shortage of freight cars?

A. I believe, Mr. Kohn, if my recollection serves me rightly—and these documents written at the time may support it or vary from it—but as I recall it, the subject was, with a new war upon us, how should we view this whole matter in the light of the emergency? I think that is the net of it. It didn't specifically deal with shortage of cars, though I think that is an obvious point that occurs in any war.

Q. Well, the emergency that you refer to existed not only in 1950, but also continued through into 1951, did it not?

A. Yes, sir.

Q. And into '52?

A. Yes, sir.

Q. Now, do you recall that Mr. Selvage told you that the campaign was like duPont saying "We can't make all the nylon that is needed," but protesting against anyone else making it?

• • • • • • •

[fol. 209] A. I think in Jim Selvage's response to my memorandum to that Committee he gave that as an illustration, as one of his points, Mr. Kohn.

• • • • • • •

Q. I take it the net result, am I correct, Mr. Deegan, of this meeting at White Sulphur was that you did not abandon the campaign which the railroad was then waging but continued with it?

• • • • • • •

Q. If I may clarify it, the campaign that Mr. Selvage, Mr. Lyne, and yourself were talking about.

• • • • • • •

A. The public education campaign--

Mr. Kohn: Could you please answer yes or no—

The Witness: How can I answer yes or no? You have got it over a period of time here.

Mr. Kohn: Excuse me, let me finish.

(Continuing) and then make whatever explanation you want.

The Court: Are you going to restate the question?

By Mr. Kohn:

Q. Well, let's take in the ensuing six months.

A. There was no alteration in the campaign, as I recall.

Q. And the following year, 1950.

A. I believe not, sir.

[fol. 210] RAYMOND J. LITTLEFIELD.

Direct examination.

By Mr. Kohn:

Q. I show you a letter dated November 29, 1950, from you to Mr. Girdler of the Byoir organization, a copy going to Mr. Deegan, to which are attached two pages titled, "Comments on Speech of J. L. Snead, Jr.," which has been marked Exhibit P-249.

I call your attention to the last paragraph of the memorandum, in which you state, "There are so many phases of long-haul trucking that are basically unsound economically that the industry will grasp at any straw to befog the real issues."

Now, I take it at that time, November 29, 1950, it was your opinion that there were many phases of long-haul trucking that were basically unsound economically, is that correct?

A. May I look through this memorandum?

Q. Go right ahead.

A. Yes, sir, that was my views, but the words "industry" in the last line may not be quite clear, what industry I had in mind. I had in mind the trucking industry.

Q. I haven't asked you about it, but I thought it was obvious.

Now, I take it you were making the point that the finest coordination possible was long haul by rail and short haul by truck; is that right?

• • • • • • •

A. There was no question in my mind that the coordination, long haul by rail and short rail by truck, was a fine method of coordinating, yes, sir.

By Mr. Kohn:

Q. That, naturally, was the objective you sought, wasn't it, the finest coordination possible.

[fol. 211] A. I don't understand what you mean by objective we sought.

By Mr. Kohn:

Q. Weren't you interested in an economical transportation system for the nation?

A. Yes, sir.

Q. And this was the finest and most economical transportation system, was it not, long haul by rail plus the short haul by truck?

• • • • • • •

A. It was one of the desirable methods of transportation, but it wasn't the only one, by any means.

• • • • • • •

Q. I call your attention particularly to item No. 2, Mr. Littlefield, page 1 of the comments.

A. Yes, sir, I stated in the letter that the long haul by rail and short haul by truck was the finest coordination possible, yes, sir.

[fol. 212]

EXHIBIT P-11

INTER-OFFICE COMMUNICATION

CARL BYOIR & ASSOCIATES, INC.

TO: Gerry Swinehart
cc: Bill Hutchinson

DATE: June 6, 1952

FROM: Horace Lyon

SUBJECT:

You asked about our use of Mrs. Mott.

She is on retainer ($500 a month) for months of May and June *ONLY*—when the state and national Fed. of Women's Clubs and Bus. & Prof. Women's Clubs are holding their annual conventions, setting up next year's program plans, etc.—to do these things:

1. Get our program guide on the need for a modernized national transportation policy published with the endorsement of the Natl. Fed. of Women's Clubs.

2. Get transportation on the program agendas for next year (i.e.: next fall and winter).

We are getting results, and value, on both counts.

Reyn and I (had) (have) the understanding with Mrs. Mott that her performance during May and June would determine whether or not we used her services starting again in Nov. or Dec., etc. when the fight would get "hot".

Reyn cleared with Blosser on our use of Mrs. Mott these two months.

HLL

[fol. 213]

EXHIBIT P-23

May 13, 1952

To: Dick Strouse
cc: Muriel Fox, Bob Davis

From: Chan Hadlock

At belated last, this is confirmation of my understanding of our conversations concerning the desire of the account to utilize existing radio and television vehicles to portray truckers as evil, sinister wrong-doers.

Actually the proposed program fell into three categories. Not necessarily in order of importance—1) An effort by me to create and sell free-lance network radio and/or television scripts to existing dramatic programs with the trucking theme as basic plot, picturing the trucker as a law-breaker etc. As we discussed, invariably to conform with network requirements the "bad" truckers may have to be compensated for by "good" truckers, but the poison will still be there and the damage done. 2) We will make all possible efforts to enlist the aid of regular and free-lance writers to utilize the trucker as a heavy for shows they are writing or will be writing. Special emphasis will be placed on trying for a soap opera contact and such utilization. 3) We will merchandise as much as possible, some basic plot lines with truckers as the heavies, for use by an existing show, and/or regular or free-lance writer. Actually the final two points do overlap in some respects.

In connection with the first item, I have approached Leonard Blair, National Program Manager of ABC Radio, and he is considering a truck plot line for the ABC Radio dramatic series "Top Guy." I should hear from him within a couple of weeks.

In connection with the second item. I have approached two writers, one a very top TV scripter (Suspense, Danger etc.), and he has agreed to use some of our material as [fol. 214] plot bases. However, he brought up an important TV problem, which I know I will hear again, and which we briefly discussed. That is briefly, a truck script invariably

calls for some action outside. Since this is not practical live, it obviously calls for film, and this simple requirement might cause such scripts as we originate to be rejected. Therefore, as I understand it, there will be necessary means to offer film footage of considerable length which a TV producer could integrate into a cops-'n-truckers chase. This may be the property of the railroads, could be rented from stock footage houses, or shot to specification. But we can offer footage as an inducement and part of our cooperation. As you indicated the offer can appear to come from the Babbitt Alarm people.

And the last, a tougher nut to crack, I have nothing to report but may have some action on this in the future. Basically at the moment it's vital to get some plots worked out of the materials you have, and will give me.

As a sidebar on the project we did suggest that we look into the matter of securing the TV and/or radio adaptation rights for any novels (They Drive By Night, etc.), that picture truckers in the desired light.

We could then offer these gratis to some free-lance adapters, pitched for shows that require that the writers furnish cleared vehicles. This will undoubtedly take some time.

Check me on these things, and see if I'm correct in my understanding, and let me know what you think.

...CH...

[fol. 215]

EXHIBIT P-26

THE PENNSYLVANIA RAILROAD COMPANY
GENERAL OFFICE

Walter S. Franklin
President

Broad Street Station Building
1617 Pennsylvania Boulevard
Philadelphia 4, Pa.

At Washington, D. C.
October 6, 1949

Mr. Reynolds Girdler, Vice President
Carl Byoir & Associates, Inc.
10 East 40th Street
New York 16, N. Y.

Dear Mr. Girdler:

I have read with interest the memorandum attached to your letter of October 4th.

While you have touched upon enforcement of the law covering speed, weight restrictions, etc., as applicable to the big trucks, I do not think you have emphasized this phase—in what I hope may be covered by your publicity release—to the extent that it is justified. It has only been within the last few months that any attempt has been made to enforce weight regulations. Excessive weights have greatly added to the damage of roads. In certain States trucks are only allowed a speed of 30 miles per hour. Truck owners will confirm the fact that their drivers do not pay the slightest attention to this restriction, and your experience on the highways will also confirm this.

When and as you approach the remedies, I think you should emphasize that many truckers are perfectly willing to pay fines of $50. for excess weight, and do so whenever they have been stopped. The excess revenue more than justifies the small fines, which, from a practical standpoint, are ignored.

[fol. 216] If the loading of excess weights is to be stopped, fines will have to be increased, but it would be far better to follow the usual practice applied to drivers licenses, that is, where there is more than one offense, to suspend the truck license for a period of a month or more. The suspension of the driver's license would be similar to the slight fine now applied, but the suspension of a truck license prevents that truck from operating in that State and would obviously materially reduce the earnings.

We are very much interested in the progress of your efforts, and I hope these suggestions may be given consideration.

Yours very truly,

W. S. FRANKLIN
President.

[fol. 217]

EXHIBIT P-27

THE PENNSYLVANIA RAILROAD COMPANY
GENERAL OFFICE

R. J. Littlefield
General Tax Agent

D. H. Worrall
Tax Agent

E. E. Kinzel
Tax Agent

1767 Broad Street Station Building
Philadelphia 4, Pennsylvania

October 12, 1949

Mr. Reynolds Girdler, Vice Pres.
Carl Byoir & Associates, Inc.
10 E. 40th Street
New York 16, N. Y.

Dear Mr. Girdler:

Yours of October 4th.

Over the weekend, I read your memorandum to department heads and it is most refreshing. For fifteen years I have devoted more or less time to this subject, but rarely

found anyone inside or outside of the railroad fraternity who had the time to seriously study all phases of this complicated problem.

Your overall approach is broad and constructive, and the following is not criticism but suggestion that may avoid complications later on:

Page 2—"But they represented an outright gift to the trucking industry of free roadways over which they could do business at public expense."

The trucking industry will give you a pretty warm argument on this point inasmuch as they do pay a very substantial amount in the form of motor vehicles taxes which are, as you know, earmarked for highways in 21 States. You have plenty of arguments to show that they [fol. 218] are not paying their fair share of these highways and are contributing, in many cases, nothing, and in other cases, very little, in the way of honest-to-goodness taxes for the general functions of government other than highways.

Page 2—"But with the outbreak of war, as you all know, the trucking industry practically collapsed as a transportation agency."

As a long-haul transportation agency it certainly did very nearly collapse. It was unable to take any part of the tremendously increased freight brought about by the war. However, I hope your staff will appreciate that there must be some difference between long-haul over-the-road trucking and short-haul trucking in local and municipal areas. The short-haul truck increased greatly during the war because here the truck could do a job better than any other form of transport. For example, we found that the convoys were going out light from New York because the floating conditions were such in New York harbor that we could not move the freight across the harbor fast enough. To remedy this, fleets of trucks were employed by all railroads to move large tonnage through the tunnels and avoid the floating problem. The Pennsylvania alone trucked as much as 100 carloads a day from the Jersey side to piers throughout greater New York.

Page 6—" . . . State Rail Taxes Exceed Highway Revenues . . . " I'm wondering if this was not a misquote.

On page 7 you state that only one research book is available. In order to provide all members of the committees with a copy, we have had to increase the number and go into a different form of printing commencing with Volume IV. We have extra copies and can furnish you any number you need. We could also dig up one or two extra copies of Volumes I, II and III if they will expedite matters with you.

Yours truly,

R. J. LITTLEFIELD

[fol. 219]

EXHIBIT P-28b

THE BALTIMORE AND OHIO RAILROAD COMPANY
LAW DEPARTMENT
BALTIMORE, 1, MD.

E. H. Burgess
Vice-President
and General Counsel

March 1, 1949.

Mr. Reynolds Girdler, Vice President
Carl Byoir & Associates, Inc.,
10 East Fortieth Street,
New York 16, N. Y.

Dear Mr. Girdler:

I have read with the greatest interest and want to thank you for your letter of October 4 enclosing your office memorandum in reference to the public relations work you now have under way for the Eastern Railroad Presidents Conference—Transportation Committee. The memorandum well states the objectives and the means for their attainment.

I have for years had a deep interest in this whole subject, and if future releases bearing upon it are made I shall greatly appreciate receiving a copy.

Very truly yours,

E. H. BURGESS

[fol. 220]

EXHIBIT P-28c

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
Terminal Tower . Cleveland, Ohio

Walter J. Tuohy
President

October 3, 1949

Mr. Reynolds Girdler, Vice President
Carl Byoir & Associates, Inc.
10 East 40th Street
New York City 16

Dear Mr. Girdler:

Indeed I appreciate your thoughtfulness in sending me the copy of a memorandum prepared for the guidance of the department heads of your organization on the work for the Eastern Presidents Conference.

I have read with a great deal of interest your approach to this subject and feel sure that the over-all outcome of the campaign is going to be quite gratifying.

Sincerely yours,

WALTER J. TUOHY

[fol. 221]

EXHIBIT P-34

EASTERN RAILROADS MAGAZINE REPORT

During the past year the CB&A magazine department has worked with every major monthly and weekly magazine in the general field with such effect that every one, from Harper's magazine to Life and the Saturday Evening Post, has either published or has scheduled publication of a story favorable to our point of view.

The magazine department has worked in three different ways in putting over the railroads' argument on the transportation problem. (1) It has suggested story ideas to magazine editors or free-lance writers, the stories to be

written outside of CB&A. In the case of the railroads, this has been the most frequently used method of placing a story, since the controversial nature of the account and the violence of the opposition makes it dangerous in most cases to become too obviously involved. (2) It has kept constantly in touch with a large number of editors and writers in order to be apprised at all times of any scheduled stories bearing on the problem. (3) It has written its own stories for placement in magazines. This last procedure has been followed much loss frequently in the case of the railroads than with other accounts, for the reasons mentioned above.

Due to the exceptionally long deadline requirements of magazines, a good portion of the stories mentioned in this report have not yet seen print. However, almost every story mentioned here has actually been published or is definitely scheduled.

LIFE: This magazine has definitely scheduled at least one, perhaps two, stories on the present road tests being conducted in Maryland. CB&A brought the story to the attention of Life's science editor, who assigned a photographer for three days during the second week in July to take pictures of the early stages of the test. Life will send [fol. 222] another photographer to cover the test in the autumn to show before-and-after pictures of the road's deterioration. The second story is definitely scheduled for autumn. However, Life may run a story in the near future featuring the July pictures. (Note to Ben—we will probably have word on this by the end of this week.) In this case, we are giving extra-cautious handling to the story: after the initial interesting of the magazine in the piece, we are trying to keep out of the picture as much as possible and contenting ourselves with a general follow-up of the story's progress.

Life has had for several months a story in its inventory on the general subject of the trucks and how they are cluttering up the highways. We have worked with them on this, but they had had difficulty, despite a good deal of effort on their part, in getting good pictures to illustrate it with. We are keeping on the lookout for any picture possibility that might revive the story.

READER'S DIGEST: CB&A put considerable effort in researching and providing material for Frederick C. Brownell for his piece, "The Rape of Our Roads," which appeared in the June issue. It might be pointed out that the article was so effective that the ATA recently was forced to resort to a full-page advertisement in Editor and Publisher defending itself against the criticism voiced by Brownell.

The July issue of the magazine contained the article, "All the Railroads Want Is a Fair Deal," by John L. Beckley with whom CB&A originally worked when the article was scheduled for Newsweek magazine.

HARPER'S: CB&A learned that this magazine had assigned a story on the general topic of the deterioration of the roads to Myron Stearns, a free-lance writer. The magazine department immediately contacted Mr. Stearns, learned that he was far behind schedule and in a hurry to make his deadline. We spent two days providing material for him and as a result the piece, "Our Roads Are Going to Pot," [fol. 223] scheduled for September or October, will in all probability strongly favor our point of view. Stearns is a contract writer for the Reader's Digest and, if it does not too closely parallel the Brownell piece, his article may be reprinted.

CB&A submitted a staff-written article, "Revolution on the Roads," to Harper's early in the summer. The story dealt with the rise of the trucking industry and its effects on the nation's driving habits. Harper's liked both the subject matter and the writing, but it felt that the CB&A connection ruled out the piece for that magazine. However, Harper's is now planning to assign such a story to one of its writers, and the CB&A-written article is now under consideration by the

ATLANTIC MONTHLY.

ARGOSY: At a meeting with the editors of this magazine the magazine department suggested a story describing the life of a small, fly-by-night trucker, the story to be based on a New York-Buffalo trip with the driver. Argosy has requested an outline, which they are now considering.

PARADE: This magazine has scheduled a picture story on the Maryland road tests for late fall. CB&A is furnishing both the text and pictures.

SATURDAY EVENING POST: Article by SEP staff writer, David Wittels, scheduled for early fall publication as lead story. CB&A furnished extensive national research in 5000-word background memorandum to round out Wittels story on Maryland state highway commission program.

PAGEANT: Article by free-lance writer, Clive Howard, scheduled for September publication entitled, "The Great American Honk-Honk." CB&A furnished research and statistical background for this definitive article on problems of highway congestion.

EVERYBODY'S DIGEST: Article by free-lance writer, Bertram Vogel, entitled "The Giants That Wreck Our High-[fol. 224] ways" appeared in April 1950 issue. It was based almost completely upon CB&A research and development.

THE AMERICAN MAGAZINE: Article by Senator Joseph C. O'Mahoney entitled "What Bad Roads Are Costing Us" appeared in April 1950 issue. CB&A furnished minor research and comment for this article on national transportation problems and need for congressional action.

COLLIER'S WEEKLY: Article by Collier's staffer, Bill Davidson, now in work based on CB&A research project entitled "Showdown in Illinois" on state highway regulation program.

CORONET: Article conceived by CB&A and written by free-lance writer, Dickson Hartwell, entitled "They Guard Your Pocketbook" scheduled for fall publication. Major portion of article deals with work of Citizens Public Expenditures Survey and results of Griffenhagen survey.

HOLIDAY: Article on Route 1 and the hazards of passenger travel from New York to Miami now in writing.

SATURDAY EVENING POST: Research project by CB&A on letters to the editor now in the hands of SEP associate editor, Wesley Price.

In addition the magazine department handled service queries from numerous other magazines as well as from the account itself. Obtained permission from Reader's Digest author Brownell to reprint, without making royalty payments, his June "Rape of the Roads" article in four railroad brotherhood magazines; obtained reprints of various articles; and by keeping in weekly contact with magazine editors and writers were able to soft-pedal or side-track several incipient stories that would have proved detrimental to the railroads' interest.

July 20, 1950

[fol. 225]

EXHIBIT P-35

Memo to: Mr. Swinehart

Re: Discussion with Metzman

June 1951

Background of Problem

When the presidents decided to embark on this program, they decided that a change in their tactics was necessary. They decided to abandon completely attacks by the railroad industry on trucking subsidies, and in their stead, carry on the fight by means of other affected groups. This meant, in the final analysis, involving other people and getting them to fight your battles.

Now where could you find such people? Obviously, the only people that you could involve directly, and upon whom you could rely for stout fighting, were people who had some reason to do something for the railroads.

As an example, we were able to mobilize the farm groups partly out of railroad association with certain farm leaders but mainly through the deal we made in support of the farm radio network. Everyone understood the quid pro quo, so the alliance was a strong and reliable one.

But speaking generally, the entire campaign, in every state, has been badly handicapped because the railroads themselves have not been organized properly to exploit their many contacts.

Here are some examples:

We formed the Empire State Transport League in New York because we needed an organization that could legitimately mail all types of propaganda on the general subject of trucks and highways.

You needed some strong man to take the lead in forming the group, even though his name might *never* appear in it. We went first to Charley Symington, of Symington Gould. Everyone in the railroad business told us Charley [fol. 226] would do anything to help the railroads. Charley ducked the job neatly. The proper people didn't put the arm on him. Others either ducked out entirely or promised to do things they never did. We wound up with a few fellows, some of whom allowed their names to be used, but that was all.

The secretary was a former assemblyman, college pal of Kiely's, and a dealer in gravel which he sold to the Central. He was the main worker. While doing work for us, he discovered that his gravel competitor, who always shipped by truck whenever he could, had just landed a big New York Central contract.

One motor club we tried to get was largely owned by a director of the Erie. We tried to get Johnston, president of the Erie, to speak to his director and get that motor club to join the fight. We never heard another word.

In Ohio, we were rounding up local truckers. The man from the Baltimore & Ohio who was on the Ohio committee was trying to line up his truckers through his trucking man when the operating vice president of the B & O countermanded the order and we lost two witnesses and spokesmen. I could recite incidents like this not by the sixes and sevens but by the hundreds.

On the other hand, two agricultural agents of the New York Central were all we needed in Ohio to get all four major farm groups out there and a lot of other strong citizen groups too. Just imagine what could be accomplished if somehow the resources and contacts of the railroads could be properly mobilized!

The truckers can do it—why not the railroads?

To sum up: the big lack in this effort, and a lack that Dugan foresaw in the beginning, is a man or the mechanics

by which ALL the contacts and resources of EACH railroad can be utilized. The more railroad people whose contacts can be utilized, the more people you involve on your side. The more people on your side, the greater the publicity and the greater the public pressure.

[fol. 227] Now, what's to be done?

Frankly, I don't know. Somehow the word must be gotten to on-the-line people that the presidents are spending real money on this campaign and they mean business.

Perhaps we should hold meetings with each department head of each railroad as we start into a new state. As you know, we have had meetings with state association people, but too many times some of these members come to the meetings in a purely perfunctory manner and later, when you call upon them for some help, do little or nothing because there is no president's name on the order blank.

Dugan originally foresaw the need for one man to coordinate this effort, and described the duties of such a man in the memorandum that started this whole thing. That need for strong coordination, for effective liaison between individual railroads and individual railroad men, is what prompted him to suggest to Metzman that I be hired by the Conference full time for that coordinating job.

You have a delicate problem here because implicit in all this discussion is criticism of the PR Committee. No such criticism is intended, nor can it be fairly leveled against the PR men. Each state job is really the responsibility of the individual state committee, some of whose members know the story and take it seriously, some of whom do not. But even committee members who work hard at their assignments can be stymied now, as witness the case of the B & O man. Chase of the Pennsylvania, chairman of the committee, was in no position to override or even question an operating vice president of the B & O. That operating vice president was not to blame; he didn't even know of the Ohio effort and probably thought his man was off on some boondoggling expedition instead of attending to the business for which he was paid.

So I think you could properly raise the question with Metzman as to the possibility, in the future, of having

department heads summoned to a meeting by a presidential edict. The president may or may not attend such a meeting. [fol. 228] That wouldn't matter so much as merely the knowledge that he was interested in the effort. It all gets down to that; *there must be more evidence of presidential interest.*

We can take it from there.

Such operating difficulties have been held to a minimum in New Jersey largely because of the interest and strength of Bill White of the Lackawanna and Herman Pevler, an operating vice president of the Penn. But Pevler is gone now to Chicago, and we will lose an effective personality. I don't know how much interest the new man will take in this situation.

This discussion could do much to acquaint Metzman with the problem and the ways of ameliorating it. It also should raise the other questions on which you can be firm, and don't forget a plug for Blosser.

[fol. 229]

EXHIBIT P-109

MEMORANDUM

To: Don Stull Date: June 29, 1951

FROM: C. Colburn Hardy

Enclosed is material which will outline Senate Bill 615 which we are vigorously opposing. This measure, in some form, has come up for the past six years and has been defeated largely by the opposition by the Governors—Ed Martin and Jim Duff. This has made the auto clubs and public rather unorganized but we have been able to change that considerably.

The enclosed editorials will give you an idea of what we're striving for—(1) to defeat the bill outright or (2) to delay action until the Maryland road tests are complete. You will have to use whatever theme seems to fit the editor.

Our general technique has been to contact the local auto club and get them to issue a statement or a letter to the senator and representatives. Then you pick this up by the

local press. We're interested particularly in the Armstrong and Butler counties. The big cities are Butler and Kittanning. The senator is Albert R. Peachon, 903 Fifth Avenue, Ford City. The dailies are the Butler Eagle and the Kittanning Leader-Times. If you want to hit New Castle and Grove City, that's okay, but we're in good shape in those counties.

I think it will be okay to be working with the Pennsylvania State Grange. The secretary is Joab K. Mahood (pronounced Mu-hood). They are leading the fight, working with the Motor Federation of Pennsylvania (AAA), Pittsburgh Motor Club, Federation of Women's Clubs, Association of Township Supervisors, CIO and UMW. I think the pressure of the labor groups will be helpful in this area.

[fol. 230] You can explain that you've been working with the Ohio Grange and that the National Grange has pulled everybody into this fight.

This is a little ticklish, I know, but I'm sure that you can handle it. We're trying to keep the railroads out of this but if you need help, you can contact J. A. Kennedy, who is the Pennsylvania agent at Kittaning or J. W. Carr, Pennsylvania agent at Butler.

As we haven't been able to get the auto club to move, we've been making a direct approach to the papers and asking for editorials. Then we picked up the editorial and sent it to the senator, etc., but let's do that from Harrisburg. I'll be in New York on Monday and in Harrisburg on Tuesday at the Penn-Harris Hotel. We're making our headquarters at the Pennsylvania State Grange, Telegraph Building, Harrisburg 2-3791.

The Pittsburgh papers are hot against the bill which should be helpful. Jim, Horace, or I can answer all questions.

[fol. 231]

EXHIBIT P-148

INTER-OFFICE COMMUNICATION
CARL BYOIR & ASSOCIATES, INC.

TO: Jim Miller DATE: Aug. 29,'52

FROM: Gordon Sears SUBJECT: Toll Roads

Jim:

The enclosed opus has passed the board of censors on ERTC and now we are ready to decide which magazine should perpetrate it upon the defenseless public. Coly is convinced it can be slicked into a slick mag, advertisers be damned, since it really doesn't take any roundhouse swipe at the truckers. I'm inclined to agree that it could hit a good general circulation magazine. If you could get a nibble from some such I could (I think) convert it to the appropriate style or get sex into the lead or whatever is needed. But, then, you get paid to worry about these things so I will accept your decision in good grace. Then you can convince Coly.

[fol. 232]

EXHIBIT P-174

INTER-OFFICE COMMUNICATION
CARL BYOIR & ASSOCIATES, INC.

TO: John Stahr DATE: June 30, 1952

FROM: Pat Lochridge

Another nomination from the magazine department—that ace ghostwriter, James Miller—from one slight clipping in the Manitowoc, Wis., Times developed a 1500-word story, "History, Trucks and Money", which appeared in the April issue of the National Grange. This article was important to the ERTC cause because it reached the group, the ac-

count was most concerned about, namely the farmer. The article skillfully developed all the major points in the ERTC campaign.

P. C.
...pl...

Please return magazine for our files.

[fol. 233]

EXHIBIT P-178

May 20, 1952

Dr. Milton S. Eisenhower, President
The Pennsylvania State College
State College, Pa.

Dear Milton:

Am enclosing a copy of "History, Trucks and Money," which appeared in National Grange Monthly of April.

A few of the high spots of this article are:

(a) Highways are going to pot.

(b) One of the major contributing causes is the big over-the-road truck.

(c) It will require $4 billion a year for the next 15 years to maintain our roads at present standards.

(d) There are two answers—(1) Cut down on the damage; and (2) Get more money for upkeep.

(e) The big intercity truck that pays the smallest proportionate share should pay more for use of public property for private profit.

Yesterday, the Firestone Tire & Rubber Co. carried a full-page ad in the New York Times, emphasizing the importance of good roads. In this ad the statement is made that from $5 to $7 billion a year for the next 15 years will be needed. The ad gives us no light as to where additional money is to come from.

We don't disagree with the importance of good roads, and the necessity for much more vision in planning highways, especially in or around congested areas.

The ad states that "more than 40,000 communities are completely dependent upon cars, trucks and buses for all

of their transportation needs." This is not a correct statement. It was worked out by some clever mathematicians who are in the trucking industry. If a railroad station has [fol. 234] not the same name as the community, it is classified to a point without rail transportation. Another ridiculous method is, for example—Community "A" may not have railroad tracks, but Community "B", which adjoins, and is sometimes only a mile or two away, may have the best railroad service in the world, yet Community "A" is classified as being served only by highway transportation. We hope to clear up this misunderstanding.

Another development which has made history is the Maryland Road Test. For the first time in the history of the world a stretch of highway was set aside and used only for testing purposes. Trucks of different weights ran back and forth over this test road for six months. After thousands of tests and records were checked, the Highway Research Board found that an axle load of 22,400 lbs. did six times the damage of an axle load of 18,000 lbs., and a tandem axle of 44,800 lbs. did twelve times the damage of a tandem of 32,000 lbs.

In spite of these findings, the trucking industry is turning heaven and earth to get heavier weights on public highways. Furthermore, the trucking industry is so upset over the findings of the Maryland Road Test that it is using all sorts of tactics to discredit the conclusion. There is attached some of the recent material on the Maryland Road Test.

Trucks are here to stay, but a tremendous amount of research and public education will be necessary before this country has the right answer to the economics involved in the use of public property for private profit.

In many state legislatures, the most controversial issue year after year surrounds the big truck—size, weight and payment for use of public highways.

Sincerely yours,

/s/ "Patch"

[Enclosed was a copy of Plaintiffs' Exhibit 173 reproduced at pages 573b and 574b of Appellants' Appendix in No. 12751.]

[fol. 235]

EXHIBIT P-187

INTER-OFFICE COMMUNICATION
CARL BYOIR & ASSOCIATES, INC.

To: Pat Lochridge

FROM: Don Stull SUBJECT:

Coly Hardy asked me recently to give you some sort of "package" on Lasuche's stand on the weight-distance tax. I tried gathering up scattered quotes, but this didn't offer what I thought was a good "package." However, I recently had the opportunity to help one of Lausche's publicists prepare an answer to a critical letter the governor had received from the head of a trucking firm. The enclosed copy of the letter (containing mostly our poison) pretty well lays down Lausche's policy on the matter.

I'm enclosing also a news clipping which shows how vigorously he supports the tax.

As of this writing, the Lausche letter never has been released to the press—although I'm doing all I can to see that it is. If, however, you want to quote him on any part of it, I'm sure we can arrange that. For the letter really contains nothing new—he's said it all before in some form in the public prints.

Regards,

[fol. 236]

EXHIBIT P-207

ERIE RAILROAD COMPANY
ERIE

George C. Frank
Assistant to President

Midland Building
Cleveland 15, Ohio

October 10, 1950

Mr. T. J. Deegan, Jr., Vice President
The Chesapeake & Ohio Railway Company
Chrysler Building
New York 17, N. Y.

Dear Mr. Deegan:

Your joint letter of September 26 was very helpful in reviewing the previous discussions on the problem being considered by our committee. There is no question that serious thought should be given to an appraisal of our present activities and our future course of action in view of the Korean war. I can well appreciate, too, the need for having definite objectives from a public relations standpoint.

However, I think we should also keep in mind that, as a subcommittee of the Eastern Railroad Presidents Conference, we are to deal with such competitive transportation matters that can be handled on a state level, particularly on the subject of proper allocation of highway user charges.

In reading the so-called "Manifesto" once more, its purpose seems to be to urge immediate action on the establishment of a national transportation policy. There is nothing now in this statement that hasn't been said many times before and is already a matter of public record. Frankly, I don't see the need for issuing such a statement [fol. 237] by the ERPC, nor can I see that it would accomplish any purpose. In fact, I think it would be a mistake for them to do so. The railroad position has already been expressed through the AAR in the S-50 hearings, in its

advertising and in public statements. The issuance of a "Manifesto" as proposed would not give us anything we do not already have.

If it is the intention to give more emphasis at this time to the establishment of a sound transportation policy, the matter is one that should be handled under the direction of the AAR in the light of their preparation and presentation of the testimony in S-50. Anything we would attempt to do in this connection might be in conflict with the activities of the AAR. I do not think it would be good judgment for a regional group to try to carry the ball on a national policy of this kind, and in my opinion, it is beyond the jurisdiction of our committee.

As a matter of fact, I was surprised to learn from the letter you wrote to Tommy Ross, that the seven points you outlined "have been the objectives of the Competitive Committee since it was organized." It seems to me that we are all losing sight of the job we were designated to do and that there is a need to clear the atmosphere.

While the seven points listed are a necessary part of telling the overall railroad story, are we actually attempting to make them our objectives, or are we to try to correct transportation inequities in the 17 states represented by the Eastern Railroad Presidents Conference?

While I was not present at the White Sulphur meeting, from the correspondence and discussion since that time, it seems that the specific question we have been asked to resolve is a theoretical one, namely, "how can the railroads justify their efforts to make long haul trucking more expensive when, with the present car shortage, they are not in position to handle any greater volume of business." If this is the basic question, the "Manifesto" does not help to clear up the point. Perhaps some statement can be drafted [fol. 238] to anticipate this question, but I don't think the "Manifesto" does it.

Yours very truly,

CC: Messrs. C. R. Dugan
J. M. Fitzgerald
J. G. Lyne
T. J. Ross
R. N. Van Sant

[fol. 239]

EXHIBIT P-261

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
Chrysler Building, New York 17, New York

September 13, 1950

Mr. T. J. Ross
Ivy Lee and T. J. Ross
405 Lexington Avenue
New York 17, New York

Dear Tommy:

At our meetings in White Sulphur, one of the discussions centered on what changes, if any, Korea would exert on the public opinion climate in which we would be operating.

It was apparent that the trucking industry would be in a position to advance two major points:

1) Since the railroads were short of cars, and since the car shortage might grow more acute, long-distance, heavy trucks should be encouraged in every way possible.

2) All weight and size limitations on heavy trucks should be waived by the states as in World War II.

As you know, ATA spokesmen have been quick to advance Point One, and are hinting at Point Two.

It seemed to us that our Competitive Committee could, however, anticipate the truckers' views and capitalize on the changed conditions by issueing a statement both in news release and paid advertising form that would

1) Dramatize the record of the railroads in World War II

2) Establish the railroads as the most essential and *most economical* transportation agency.

[fol. 240] 3) Remind the public of the tremendous investment made in new equipment by the railroads since World War II

4) *Prove that even greater expenditures would have been made had the railroads been accorded even a semblance of fair competitive conditions*

5) Give vocal and effective support to the views already presented by railroad spokesmen before the S-50 hearings

6) Identify our Competitive Committee efforts as consistent with the public welfare, and

7) Perhaps accelerate an understanding of the difficulties the railroads face in being forced to continue unprofitable, short-haul and branch line operations.

The memorandum you received Tuesday morning is designed to accomplish the above objectives. Both generally in detail it squares with railroad policy, should help in explaining any deficiencies that might arise in railroad service, gives us another opportunity to put ourselves on record in a positive and constructive manner, and, above all, reiterates the inequities in the current situation.

Sincerely,

(signed)

[fol. 241]

EXHIBIT P-275

PENNSYLVANIA STATE GRANGE
ORGANIZED 1873
103-04 Telegraph Building
HARRISBURG, PENNSYLVANIA

BEATTY H. DIMIT
Master
JOAB K. MAHOOD
Secretary
PHILIP PRICE
Treasurer
ELIZABETH MILLARD
Lecturer

EXECUTIVE COMMITTEE
W. A. ELDER
Mercer
HAROLD ALLEBACH
Collegeville
GEORGE F. RUTH
Robesonia

Thursday

Memo:

To: WILLIAM A. REITER

FROM: C. Colburn Hardy

Enclosed is a copy of a proposed release. I am not sure about it and would like to have your reaction and suggestions.

The background is this: Earl Feldman was most helpful. While he was unable to contact Fred Burgraff at the Highway Research Board, he will call me by 10 am Friday morning. He is not at all sure that we can use the report, even if it is available. He believes that it will be highly technical, will not add any new data to the road damage, and might prove too detailed to be of use in any release to the general public.

[fol. 242] There are some good points in the enclosed release: (1) It will get some space as the papers want copy in the truck fight. This would be only in the Sunday papers. (2) It will keep the battle in the press and might inspire some editorials.

On the other hand, the drawbacks are: (1) The release is somewhat forced and does not add any new information: (2) The proposal for study might be interpreted as weakness on our part; (3) The release interjects a new, and

not-quite-to-the-point theme, the weight distance tax; (4) under Penna. law, all highway user revenues are dedicated to the highway fund, so actually the extra revenue would not help to solve the tax problem unless they went into the general fund or some other form of general revenue. This could be defended but it might antagonize some of our friends from the AAA, etc.

Joe Mahood is away and has not seen the release. I think he will go for it if I insist. And, of course, I can check with Dick Maxwell.

I plan to use Cappy Thomson predicting a gas tax rise for Saturday's papers and can get this weight-distance tax story for Sunday.
BUT I'll take no action without your comments. Of course, if the Maryland Road Test report comes through and can be used, I'll concentrate on that.

COLBURN

Defeat of the Big Truck Bill and enactment of a weight-distance tax would go far to solve two of the Legislature's knottiest problems: truck weights and additional revenue, Joab K. Mahood, secretary of the Pennsylvania State Grange said yesterday. He urged that a commission be appointed immediately to study the proposals and report back later this year.
[fol. 243] "Now that the Legislature is deadlocked on tax proposals," he said, "every source of new revenue should be studied. With the rising expense of maintaining truck-damaged highways, it is clear that there must be a permanent, sound system of road financing and proper protection for our highways and bridges. From the experience of other states, it seems evident that Pennsylvania can raise an additional $15,000,000 to $20,000,000 a year by making big trucks pay their fair share of highway costs."

Mahood pointed out that the proposed commission would have the advantage of factual data: (1) on truck damage to highways from the final report of the Maryland Road Tests to be released in October; (2) on the weight distance tax as recently enacted in New York State.

"As the Grange showed recently," Mahood added, "the passage of the Big Truck Bill would permit a handful of long-haul truckers to increase their earnings by millions

while Pennsylvania would receive no more than an additional $37 per year per vehicle."

He said that Pennsylvania now receives no revenue from out-of-state trucks except a few pennies gas tax and that truck fees here were among the lowest in the nation. For a 30 ton, four axle tractor-semi-trailer, he reported, Pennsylvania would charge a $297 registration fee compared to total fees of $360 in New Jersey, $1400 in New York, $499 in Ohio, and $490 in West Virginia. He stressed that both New Jersey and Ohio are now studying ways to adopt the proposals of the Council of State Governments for the weight-distance tax.

"While we are confident that the Big Truck Bill will be defeated because of the overwhelming public opposition," Mahood continued, "we recognize that this defeat does not solve the critical problem of highway maintenance and upkeep. A factual study by highway engineers and tax experts is sure to provide sufficient data to make an intelligent, sound, long-range solution possible."

[fol. 244]

EXHIBIT D-28

COPY

SELVAGE & LEE
INDUSTRIAL PUBLIC RELATIONS
1 East 43rd Street, New York 17, N. Y.

August 9, 1950

Mr. Thomas J. Deegan, Jr., Vice President
The Chesapeake and Ohio Railway Company
Chrysler Building
New York 17, New York

Dear Tom:

I been robbed! I been misquoted! I didn't say it!

Seriously, Tom, your quotation of me in your memorandum seems to pose me as suggesting termination of the various programs as becoming untimely. After all of the discussion that followed my introduction of the war theme, Morrie Lee and I found it difficult to reconstruct all of the thinking. Jim Lyne has just about done it.

What I thought I was saying was this:

> The programs to date have been largely negative aimed directly at the trucks and designed to curb their more nefarious activities. Now, with a war situation approaching, with the possibility that there would be a shortage of freight cars (and resultantly a demand for using any kind of a vehicle to move cargo), might it not become unpopular to urge curtailment of any form of transportation. It would be like duPont saying we can't make all of the nylon that is needed but protesting anyone else making it.
>
> Therefore would we not be wise (speaking to your Committee at White Sulphur), while we are down here and in a position to get some solid thinking done, to take stock of possible future developments and plan [fol. 245] to change the editorial theme of the programs if and when it becames necessary. Let's not wait until we suddenly get hit and, perhaps, have some of our top brass suggesting termination of our efforts; let's have an alternative program ready to meet the emergency.

The last thing in the world I wanted to suggest was that we abandon ship. I simply proposed that we project a different and more positive format, if it became necessary. It would be suicidal, as Jim Lyne says, to stop everything because of the emergency. But let's be prepared to lower one flag quickly with another one ready to run up to the masthead.

I think the recent newspaper ad of ARCI embodies this thinking. It struck the affirmative note for the railroads, it recited their recent expenditures to improve their operating capacity and efficiency, but still got over the Fair Play note.

Inasmuch as our ad's theme was taken largely from Jim's memorandum, from which his editorial was in turn written, we have evinced our agreement tangibly. Summarizing—

1. It would be silly for the railroads or their supporting allies to abandon their efforts toward a new national transportation policy.

2. Intensification rather than diminution is desirable if the situation develops where trucks will be even more in demand.

3. It seems more likely than it did at White Sulphur that an alteration of structure and theme will be needed along the lines of the Lyne editorial.

Cordially yours,

/ signed Jim
/ typed James P. Selvage

/jm

[fol. 246]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 12,750 and 12,751

NOERR MOTOR FREIGHT, INC., et al., Appellants in No. 12,750,

v.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al., Appellants in No. 12,751.

Appeals From the United States District Court for the Eastern District of Pennsylvania

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Argued June 8, 1959

Before Biggs, Chief Judge, and McLaughlin and Staley, Circuit Judges.

OPINION OF THE COURT—December 10, 1959

Per Curiam.

In this antitrust action for an injunction and treble damages,[1] forty-one long distance trucking companies and

[1] Sherman Act, 15 U.S.C.A. § 1 et seq.; Clayton Act, 15 U.S.C.A. § 15.

[fol. 247] their trade association, Pennsylvania Motor Truck Association, sued twenty-four major eastern railroads, Eastern Railroad Presidents Conference and Carl Byoir Associates, Inc. a New York corporation, the public relations agency for the Conference.

Plaintiffs charged in their complaint (filed April 30, 1953) inter alia, that in or about May, 1949, the defendant Railroads embarked upon an illegal conspiracy, in violation of the civil and criminal provisions of the antitrust laws of the United States, aimed at destroying the plaintiffs and those similarly situated as competitors in the field of the hauling of freight, and at carving out exclusive, monopolistic spheres of operation in the freight transportation business of the United States, so that the railroads would have a monopoly on freight hauling in interstate commerce; that the defendant Railroads worked for those ends through the defendant Conference; that the latter retained defendant Byoir as publicity agent to carry said conspiracy into effect; that thereafter the Conference, its committees, members thereof, the defendant Railroads, their presidents and trustees and other individual defendants and Byoir, with divers other persons unknown to plaintiffs, have acted in combination and concert to obtain the objectives of the conspiracy. The means used are detailed in the complaint; a continuing conspiracy to the date of the complaint is alleged; damage to each of the plaintiffs is asserted, irreparable, continuing injury stated and an injunction asked. Defendants denied the charges of the complaint. In 1956, after the case had been assigned a trial date, October 1, 1956, and while discovery procedures were pending, some of the Railroads and the Conference sought permission to and were allowed to file a counterclaim against the plaintiffs. This claimed that plaintiffs were engaged in an illegal conspiracy to obtain a monopoly of the long haul freight industry in the same part of the United States as set out in the complaint and to force the Railroads out of that part of the transportation business in that area.

[fol. 248] The case went to trial before Judge Clary on October 1, 1956 and lasted almost four months. There were many witnesses and 968 exhibits. On October 10, 1957, the

court in an exhaustive opinion (it covers 73 pages in 155 F. Supp. 768-841) found in favor of the plaintiffs against all the defendants on plaintiffs' cause of action and against the defendant counterclaimants and in favor of the plaintiffs on the counterclaim.

Soundly based on substantial evidence, the trial court found that the Railroads and Byoir, as contended, had conspired in unreasonable restraint of trade to injure the truckers in their competitive position in the long haul freight industry in the northeastern part of the United States; that their immediate purpose was to create public resentment to the truckers, not only in the minds of the general public but in the minds of those who utilized the services of the trucks and in such a manner as to interfere with business relations between shippers and truckers; that instead of meeting the truckers competition in the long haul freight field, the Railroads and Byoir combined to injure and/or destroy the truckers and thereby force the shippers to their detriment to continue to use the Railroads; that they adopted and carried out a full program to obtain that objective; that serious private injury to the truckers was accomplished, definitely a loss of good will to the trucking industry and in some instances that loss of good will being extreme; that their actions destroyed to a large extent the public confidence which the truckers had fairly earned and which might have been increased in the light of the innumerable beneficial accomplishments of the truckers in long haul transportation.

The court found on overwhelming evidence that it was no series of individual conspiracies in the various states involved but one large ever-growing conspiracy as charged having as its goal to injure and/or destroy the long haul trucking industry and that the main means used to attain [fol. 249] such end was primarily a campaign designed to destroy the good will of the truckers and to instigate and foster government restrictions by creating public hostility to the truckers, bringing this to the attention of the various legislatures, then proposing legislation crippling to the trucking industry and favored by the Railroads, all under

the guise of public spirited organizations and with the defendants' interest concealed.[2]

The record shows the defendants' antitrust conspiracy completely established against all the defendants named in the decree.[3] It shows both legal and illegal methods to

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[2] The third party apparatus employed by the defendants, while concealing their own adroit manipulation thereof, in seeking to procure legislative and executive action is contrary to public policy and illegal. Marshall v. The B. & O. Railroad Co., 16 How. 314, 335 (1853); Angle v. Chicago, St. Paul, etc. R. Co., 151 U.S. 1 (1893); Commissioner of Internal Revenue v. Textile Mills Securities Corp., 117 F.2d 62 (3 Cir. 1940), affirmed 314 U.S. 326 (1941). Cf. United States v. Silliman, 167 F.2d 607 (3 Cir. 1948), cert. den. 335 U.S. 825 (1948).

[3] The attempt to influence legislation and executive action while rightly held by the trial court to be less important than the direct vilification of the long haul trucking industry was nevertheless properly found to be a vital element of the defendants' conspiracy to injure and/or destroy that group. Even assuming the brazen interference with legislation and executive action in this instance was lawful, its entire motivation was shown to emanate from the conspiracy charged. It was part of defendants' scheme to wreck their competitor, to monopolize that branch of commerce for themselves. As such it violated the Sherman Act. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 497-502 (1949); United States v. Krasnov, 143 F.Supp. 184 (E.D.Pa. 1956), affirmed 355 U.S. 5 (1957); Atchison, Topeka & Santa Fe Railway v. Aircoach Transport Association, 253 F.2d 877, 887 (Ct. App. D.C. 1958).

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), urged below and here by the Railroads, has no real application to the facts before us. The later decisions of the Supreme Court in United States v. Sisal Sales Corporation, 274 U.S. 268 (1927) and Steele v. Bulova Watch Co., 344 U.S. 280 (1952) clearly indicate that the Banana Company opinion is limited to the proposition that the Sherman Act cannot be invoked against persuading a foreign sovereign to act. Okefenokee Rural Electric Membership Corp. v. Florida Power and Light Co., 214 F.2d 413 (5 Cir. 1954) is the other decision stressed by the Railroads in the district court and on appeal. That too is hardly an authority for anything pertinent under the instant unescapable facts. There the complaint made no allegation that the conspiracy was directed to ruining a competitor in his business. The later case of Crummer v. Du Pont, 223 F.2d 238 (5 Cir. 1955) and 255 F.2d 425 (5 Cir. 1958), cert. den. 358 U.S. 884 (1958), leaves no doubt but that as of now in the Fifth Circuit Court of Appeals, a conspiracy to

[fol. 250] obtain the illegal objective of injuring and/or destroying the long haul trucking industry. It shows injury to the plaintiffs and to the public. It justifies the injunctive relief against continuing illegal activities of the defendants. It justifies the compensatory damages (trebled by statute) allowed plaintiff Pennsylvania Motor Truck Association, together with costs and counsel fees. It justifies the holding of the district court that the other plaintiffs, by reason of the stipulation which is very clear and is part of the record, are only entitled to nominal damages. It justifies the dismissal of the counterclaim, which action is not disputed by the Railroads except in line with their argument that the counterclaim is similar in content to the plaintiffs' claim.

Though we think it plain from what we have said, it might be well to expressly note that the suggestion that the Railroads' entire activity, spearheaded by Byoir, was merely a perfectly legitimate public relations campaign for legislation is fanciful in view of the impressive documentation in the record of the finding of the trial court " • • • *that the entire campaign and its objectives did not constitute a mere appeal to the legislature; nor was it a large scale lobbying campaign. True, one phase of the activities was of a legislative nature—but a rather new approach to legislation, to say the least. The other phase, and the more important one of the campaign, was one of vilification designed to destroy the good will of the long-haul trucking industry. Hence, the Court has rejected the contention of the defendants that their combination was entirely legislative. I have further determined that the railroads were not acting as the guardian of the public welfare, as they have so earnestly asserted.*" (Emphasis supplied).

Judge Clary's opinion is soundly predicated on the facts and law of this litigation. We are in accord with it. The decree and orders of the district court of July 22, 1958 and July 31, 1958 will be affirmed.

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drive a competitor out of business is a violation of the Sherman Act even though, as in Crummer, its most important element was the obtainment of its objective by secretly moving under the guise and protection of the public interest and through the public authorities.

[fol. 251] BIGGS, *Chief Judge*, dissenting.

The case at bar merits the attention of the reviewing Court. The record demonstrates that no cognizable offense has been proved under Section 1 or Section 2 of the Sherman Act, 15 U.S.C.A. §§ 1 and 2, and that therefore relief cannot be granted to the plaintiffs under Sections 4 and 16 of the Clayton Act. 15 U.S.C.A. §§ 15 and 26. Moreover, the reach of the decision of the court below is disastrous for it applies the Sherman Act to governmental restraints imposed by statutes enacted by state legislatures and to private activity in procuring such legislation. If the interpretation of the court below and of this court be correct the reach of the First Amendment which guarantees freedom of petition will be unduly limited and to an extent at least, destroyed. Rights guaranteed to the States and to the people by the Tenth Amendment will be endamaged. Heavy sanctions, criminal as well as civil, can be imposed on persons who seek the enactment of laws by Congress or by the legislatures of the States. I shall endeavor to deal first with what can perhaps be properly described as "conventional" antitrust law in relation to the case at bar and at a later point in this opinion will discuss the application of the constitutional guarantees referred to.

What the record proves is the following. Certain interstate trucking companies[1] were engaged in hot economic competition with twenty-four major eastern railroads[2] in the interstate transportation of long-haul freight. The Railroads and the Truckers as groups were avidly desirous of increasing their own respective interstate freight haulage and profits and decreasing those of the competing group. Both Railroads and Truckers hired public relations agencies to aid them. The ERPC engaged Byoir. PMTA engaged [fol. 252] Allied Public Relations Associates. The methods employed by the public relations agencies of both the Railroads and the Truckers left much to be desired in respect to moral consciousness. Sources of propaganda were con-

[1] Represented by Pennsylvania Motor Truck Association (PMTA).

[2] Represented by Eastern Railroad Presidents Conference (ERPC).

cealed by both sides by the use of the so-called "third-party" technique.

Both Railroads and Truckers and their agencies desired to influence public opinion in order to increase their own good will and to damage that of each other and thereby to procure legislation favorable to themselves and unfavorable to the competing group.[3] There was no difference in substance between the methods employed by Byoir for the Railroads and those employed by Allied Public Relations Associates for the Truckers except that Byoir was more vigorous, more vocal, and more effective. It was a no-holds-barred fight by both sides. The methods employed might well cause justifiable fear to those concerned with the viability of our representative form of government.

Conventional Principles of Law Hitherto Deemed Applicable to Section 1 and Section 2 of Sherman Act Suits.

As has been said, the action is based on Sections 1 and 2 of the Sherman Act.[4] It is necessary to discuss the applicability of both sections and it is more convenient to [fol. 253] proceed first with a discussion of Section 2. The Truckers' case is deficient when viewed in the light of Section 2, the "Monopoly" section, of the Sherman Act. Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any

[3] A typical example is supplied by Senate Bill No. 615, Session of 1951 of the General Assembly of Pennsylvania, referred to from time to time in the testimony as the "Big Truck Bill", caused to be introduced by the Truckers, which would have raised the permissible weight limits of heavy trucks from 45,000 to 60,000 pounds. The defendants procured the veto of this bill by Governor Fine. A somewhat similar bill, also proposed by the Truckers, was "Bill A-13" in the New Jersey Legislature. Similar legislation was also before the legislatures of New York and Ohio. I shall not detail the various bills in the various State legislatures involved. These are set out in full, with many allied matters, in the opinions of the court below. See 155 F. Supp. 768, and opinion on damages, 166 F. Supp. 166.

[4] It should be noted that neither the opinion of the court below, 155 F. Supp. 768, nor that of this court, pinpoints whether the action is sustained under Section 1 or Section 2 of the Sherman Act.

other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . . " The offense of monopolizing means ". . . . to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power."[5] American Tobacco Co. v. U.S., 328 U.S. 781, 809 (1946). Since the Railroads have not effected a monopoly on long-haul freight traffic or destroyed the Truckers' business[6] only an attempt to monopolize or of a conspiracy to attempt to monopolize can be proved against them.[7] A necessary element of an attempt to monopolize is a specific

[5] The complaint alleges a conspiracy to create a monopoly. See paragraphs 12, 13 and 14 of the complaint. I assume therefore that the action at bar was one brought under Section 2 of the Sherman Act but I make no point of any deficiency in pleading as will appear from this opinion in the discussion of the applicability of Section 1 of the Sherman Act, the "restraint of trade" section.

[6] Proof in the record aside, the court below and this court are entitled to take judicial notice that the Railroads have not driven the Truckers out of business.

[7] The circumstances are peculiarly unfitted for the maintenance of a Section 2 case. We do not have before us a situation where one corporation, or even a few corporations, attempt to eliminate all competition so that it, or they will be left with unbridled power over prices, output, and entry into the competitive field. An entire section of what may be called the "transportation" industry" consisting of many railroads is accused of trying to eliminate another section of the transportation industry, the Truckers, a situation that as far as research indicates has never previously resulted in successful antitrust litigation. Even if the Railroads had actually eliminated the Truckers' competition completely the Railroads' position would be far different than that of the successful monopolist since there still would be competition among the various railroads. Furthermore the interstate ground transportation industry is a regulated industry, with almost every phase of its activity controlled by the Interstate Commerce Commission.

[fol. 254] intent to effect that result. United States v. Columbia Steel Co., 334 U.S. 495, 531-534 (1948).

This leads to the issue which is dispositive of the Section 2 phase of the instant case. Can an attempt to monopolize the transportation of long haul freight in the sense required by Section 2 be inferred from the evidence? The elements necessary to establish an attempt to monopolize in violation of Section 2 were set out in classic form in Swift and Company v. United States, 196 U.S. 375, 396 (1905), and have remained unchanged. In the opinion last cited the Supreme Court said: "Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee*, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." Thus it is clear that in addition to an intent to monopolize, the evidence must prove that the activities of defendants in a Section 2 case create a dangerous probability of monopoly. See again United States v. Columbia Steel Co., *supra*.

The court below found as a fact that vigorous efforts were made by the Railroads and Byoir to injure the Truckers' good will business-wise, to decrease the number of the Truckers' customers, to pass anti-trucking legislation and to increase trucking costs and to prevent the enactment of legislation which would decrease those costs. The proof is not sufficient in the instant case to sustain a Section 2 charge. There is no evidence in this record proving that the efforts of the Truckers or Byoir were liable to bring the [fol. 255] long-haul trucking industry to an end. There is no showing that even the most optimistic of the Railroads or Byoir intended, expected, or even hoped, to destroy interstate trucking. The circumstances at bar do not traverse the limitations imposed by the Columbia Steel Co.

decision. Moreover, there is no proof whatsoever of a "dangerous probability" that a monopoly could result as required by the Swift decision. Under the circumstances a cause of action based on Section 2 falls. If the judgment of the court below against the Railroads is to be sustained it must be under Section 1 of the Sherman Act.

But the Truckers have not proved a cause of action cognizable under Section 1 of the Sherman Act. Section 1 of the Sherman Act prohibits "Every contract, combination ... or conspiracy, in restraint of trade or commerce among the several States. . . . " As was said in Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958), "Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those combinations which 'unreasonably' restrain competition". Mr. Justice Black went on to say that certain agreements or practices have such a pernicious effect on competition that they are "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use". Mr. Justice Black then designates the kind of practices which the courts have deemed to be unlawful in and of themselves and cites the relevant cases.[8] The acts of the Railroads and Byoir were not proved to be such as to cause the case at bar to fall within the category of cases where the principle of unreasonableness is automatically applicable. The court below so found.[9] The issue then becomes: Did the [fol. 256] combination or conspiracy here "unreasonably restrain competition"? The record fails to demonstrate that the Railroads and Byoir did so here.

Moreover, and quite aside from the foregoing, restraints which constitute violations of Section 1 are those which involve conspiracies of members of an industry to follow a mutually self-restricting course in the area of their own

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[8] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940), price-fixing; United States v. Addyston Pipe & Steel Co., 85 F. 271 (1898), aff'd 175 U.S. 211 (1899), division of markets; Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941), group boycotts; International Salt Co. v. United States, 332 U.S. 392 (1947), tying arrangements.

[9] See 155 F. Supp. at p. 816.

competence in order to obtain unlawful commercial advantages over customers or suppliers. The plan here, as proved, was to decrease the business of fellow members of the interstate transportation industry, the Truckers. Furthermore the essence of the campaign was not joint action for any one of the Railroads acting alone could have achieved the result which was attained. Any Railroad could have hired Byoir. If the law is to be changed in these important respects the revision should be effected expressly by the Supreme Court and not by this tribunal.[10]

But without regard to what I have termed "conventional" antitrust law and whether the suit is sought to be maintained under Section 1 or Section 2, or both sections, I am of the view that the provisions of the Sherman Act are not applicable here because of what is set out in the following three headings of this opinion.

Principles of Antitrust Law Applicable Under the Circumstances at Bar Where Legislative Action Was Invoked or Avoided.

The objectives of the Railroads, as found by the court below, are set out and discussed hereinafter under the heading "As to Damages". It is desirable to state again at this [fol. 257] point that the principal objective of both Railroads and Truckers was to achieve legislation which would increase their own profits from interstate freight haulage and decrease those of the competing group. The actions of the Railroads and Byoir in this respect were described by the court below as the "fomenting of governmental restriction . . . increasing the cost of operation and/or preventing the carrying of greater loads" by the Truckers, and

[10] See *e.g.* United States v. Patten, 226 U.S. 525 (1913), market cornering; Addyston Pipe & Steel Co. v. United States, note 8, *supra;* Fashion Originators' Guild v. Federal Trade Commission, note 8, *supra;* United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949), market division; United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), price-fixing, output restrictions; United States v. Paramount Pictures, 334 U.S. 131 (1948), price-fixing and United States v. Frankfort Distilleries, 324 U.S. 293 (1945), resale price maintenance.

was held to be an unreasonable restriction of competition.[11] The public interest must be deemed, of course, to be involved here as it is in every antitrust suit but there is also a potent public interest in the right of the individual to act in support of or in opposition to legislation. Does the public interest in this latter right rise superior to the public interest sought to be preserved by the antitrust laws? Does the Sherman Act apply to legislative restraints or to private activity in support of such restraints? I think the decisions demonstrate that the Sherman Act cannot be employed to make such private activities illegal and that whether successful or unsuccessful they do not constitute unreasonable restraints on interstate commerce.

In Olsen v. Smith, 195 U.S. 332, 344-345 (1904), where the restraint was imposed by a Texas statute, it was held that the intent of Congress in enacting the Sherman Act was to prevent private, not governmental, actions in restraint of competition.[12] In American Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909), the Supreme Court dealt with a very similar issue, Costa Rica, by what was in effect law, having confiscated property of one corporation at the instigation of a trade rival. Mr. Justice Holmes said that "The fundamental reason why persuading a sovereign power to do this or that cannot be a tort . . . is that it is a contradiction in terms to say that within its juris- [fol. 258] diction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper . . . It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law."

In Parker v. Brown, 317 U.S. 341, 351 (1943), California had passed a proration statute which restricted competition among raisin growers and fixed prices. Mr. Chief Justice Stone stated: "The Sherman Act makes no mention of the state, as such, and gives no hint that it was intended to restrain state action or official action directed by a state."

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[11] See 155 F. Supp. at p. 833.

[12] Cf. Mackay Radio & Telegraph Co. v. F.C.C., 97 F.2d 641, 643 (D.C. Cir. 1938).

There is no doubt that a State of the United States in the exercise of its police power may legislate for the health, safety or welfare of its people or that a State may enact legislation affecting interstate commerce if the law passed does not "impede substantially the free flow of commerce from State to State." Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945). An exercise of State police power by the enactment of legislation by the State for a proper objective is constitutionally permissible. In Stephenson v. Binford, 287 U.S. 251, 276 (1932), the Supreme Court stated: "We need not consider whether the [State] act [regulating carriage by truck] in some other aspect would be good or bad. It is enough to support its validity that, plainly, one of its aims is to conserve the highways. If the legislature had other or additional purposes, which, considered apart, it had no constitutional power to make effective, that would not have the result of making the act invalid." Cf. Sproles v. Binford, 286 U.S. 374 (1932). One of the admitted purposes of the legislation with which we are here concerned was the preservation of State highways and another was the raising of State revenues. It appears clearly that the States involved in the instant case acted within their constitutional power, just as Governor Fine acted within his constitutional power when as Chief Executive of Pennsyl- [fol. 259] vania he vetoed Senate Bill No. 615.[13] To hold otherwise would be to nullify substantially State legislative power.

It is asserted that United States v. Sisal Sales Corp., 274 U.S. 268 (1927), and Steele v. Bulova Watch Co., 344 U.S. 280 (1952), in effect overruled the American Banana Co. decision. In the Steele case the action was one brought under the Lanham Trade-Mark Act of 1946, 15 U.S.C.A. § 1051 *et seq.*, and was not based on the antitrust laws but more importantly an act of a sovereign was not involved. In the Sisal case it was held that the Sherman Act did not apply to what the defendants did in Mexico and Yucatan:

[13] Cf. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10-11 (1928), wherein the Supreme Court, granting a temporary injunction, held that the purpose of the State act procured by private activity, allegedly to conserve hulls and heads of unprocessed shrimp, was a feigned purpose and therefore was not a valid exercise of State police power.

i.e., procure discriminatory legislation there. Mr. Justice McReynolds stated, 274 U.S. at p. 276, "True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our Courts and may be punished for offenses against our laws." The American Banana Co. decision expressly was not overruled. I can find no Supreme Court decision, unless it be Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10-11 (1928), note 13, *supra*, which indicates a holding contrary to that of the American Banana Co. decision. The Foster Fountain Packing Co. case seems distinguishable on the ground appearing in the note cited. But in any event in United States v. Rock Royal Co-Op., 307 U.S. 533, 560 (1939), the defendants attempted to prevent enforcement of a minimum Price Order[14] made by the Secretary of Agriculture on the ground that their competitors had engaged in a conspiracy to monopolize in violation of the Sherman Act by securing the drafting, adoption, and acceptance of the order. Mr. Justice Reed stated: "If ulterior motives of corporate aggrandizement [fol. 260] stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act or justify the refusal of the injunction."

The facts in Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co., 214 F.2d 413, 418 (5 Cir. 1954), present an interesting analogy to those at bar and are very similar, save only that legislative action was not involved. It was alleged, however, that the State Road Department of Florida acting as a result of a conspiracy in violation of the Sherman Act between Florida Power and Light Company and others, prevented the Okefenokee Rural Electric Membership Corporation from making use of the only feasible route for an electric line along a public highway. It was alleged in the complaint that the defendants had been guilty of a "smear campaign", had made false arguments and had conducted dishonest activities as a result of which

[14] Order No. 27, under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246.

the State Road Department refused to grant the permit for the power line. Treating the facts alleged in the complaint as true, the Court of Appeals, in dismissing the suit, stated: "As so forcibly illustrated in Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156, 163, 'Injury implies violation of a legal right.' The plaintiff had no legal right to use the state highway without a permit from the State Road Department, nor the county roads without permission of the Board of County Commissioners, and those authorities have decided against the plaintiff. So long as their decisions stand the plaintiff has not been legally injured, notwithstanding it may have been irreparably damaged." Implicit in this ruling is the legal conclusion that liability under the Sherman Act cannot be sustained by virtue of official action of a State agency however inspired by the acts of individuals.

I conclude (1) that the Sherman Act was not intended by Congress to be applicable to governmental restraints by way of legislation whether or not induced by private activity [fol. 261] and (2) that private activities such as those conducted by the Railroads and Byoir under the circumstances presented here cannot be deemed to constitute unreasonable restraints or monopoly under the Act.[15]

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[15] Parenthetically, the court below reached, to me at least, the unusual result that the counterclaims asserted by the Railroads against the Truckers could not be maintained though the counterclaims allege acts of substantially the same character and nature as those of the Railroads and Byoir upon which judgment here is based. It is true that the Railroads conceded that the counterclaims are without merit. This concession was, I think, a necessary one. My view is based on the conclusion expressed in this opinion that the Truckers have not proved a cause of action under the Sherman Act. But the court below held that the Truckers' attempts at favorable legislation were permissible because they were attempting to procure laws that would better their competitive positions in relation to the Railroads. The court explains that the legislation sought would have permitted the Truckers to enter fields previously closed to them and that therefore no violation of the antitrust laws was involved. But business gained by interstate truckers of necessity would be at the expense of interstate railroads. Moreover the position of the court below in respect to the counterclaims not stating a valid and proved cause of action overlooks the "good will theory" advanced by the court

The Constitutional Issue.

If the reasoning of this opinion as expressed thus far be erroneous, it is necessary to discuss the constitutional questions which are posed by the circumstances and the decision at bar. As I read the opinion of the court below the constitutional protection asserted by the defendants was rejected on the ground that by resorting to a campaign of defamation the Railroads and Byoir invalidated the guarantees of the First Amendment.[16] The majority opinion seems to take a similar view. But I had not hitherto imagined that a constitutional guarantee could be avoided because of the bad conduct of the individual asserting the constitutional right. I do not believe so now. It might be argued, of course, that a determination that a restraint is unreasonable obviates constitutional guarantees but to state this argument demonstrates its invalidity. Cf. United States v. Columbia Steel [fol. 262] Co., *supra*, 334 U.S. at p. 522. The vast importance of the right to petition, usually exercised by joint action, was set out by Mr. Justice Brandeis in his dissenting opinion in Gilbert v. Minnesota, 254 U.S. 325, 337-338 (1920), as follows: "The right [to petition] . . . necessarily includes the right . . . to endeavor to make [one's] . . . own opinion concerning laws existing or contemplated prevail. . . . Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril." Mr. Justice Brandeis' view in the Gilbert case became the law in Dennis v. United States, 341 U.S. 494 (1951). The First Amendment protects "secular"

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itself as the basis for its judgment. That there were attacks made by the Truckers on the good will of the Railroads is indubitable and the court below so found. See 155 F. Supp. at p. 803. The distinction attempted to be made by the court is too subtle for me to grasp. It seems to be based on the theory that under the Sherman Act what is one competitor's meat may be another competitor's poison.

[16] See 155 F. Supp. at pp. 826-829.

causes as well as "religious or political ones". Thomas v. Collins, 323 U.S. 516, 530-531 (1945). A proposal to tax trucks stands upon the same ground as a religious speech or an unpopular political idea. The expression of "bloc sentiment" is an integral part of our legislative process. United States v. C.I.O., 335 U.S. 106, 143-144 (1948). There can be no question that the "idea" that trucks should or should not be taxed by the States has "social importance". Roth v. United States, 354 U.S. 476, 484 (1957).

If persons are to be prohibited access to legislators because their utterances may be offensive to personal taste or morals we have moved far away from the Framers' conception of our republican form of government. The concept of lack of access by the people to a legislature is in its essence totalitarian. If material contrary to good morals, such as obscene matter, is placed by an individual or a group in unenlightened self interest before a State legislature it is, of course, permissible for the State to punish the projectors of such material by criminal or civil sanctions. But the imposition of such sanctions assuredly is not the function of [fol. 263] the antitrust laws of the United States. To say that an individual legislator may be over-persuaded or wrongly convinced as to how he should vote is to state a commonplace but to deprive an individual of the right to petition under the guise of protecting private companies from restraint of trade or monopolistic practices is to say far too much and to say it badly. To whom may a person go to attempt to create or change the laws under which he lives if not to his Senators or Representatives, State or National? True, ills may inhere in this democratic process. The legislature may be propagandized by material from a tainted source but this is an abuse which is curable as Congress has cured it.[17] If persons are to be deprived of the

[17] It should be observed that the court below effected legislation for it requires the Railroads and Byoir not to publicize material relating to the Truckers "without disclosing their [own] participation". See paragraph "IV-(6)" of the final decree. I would conclude that this alone would require modification of the form of the injunction entered by the court below and approved by this Court. Cf. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), in which the Supreme Court interdicted the prohibition of "privacy in group association".

right to petition because that right has been subject to abuse, liberty visibly will take flight.

I think that every thoughtful person will agree that the legislative processes cannot be conducted successfully and should not be conducted at all unless members of the public and all interested groups are allowed free access to legislators and legislatures in respect to legislation, pending or proposed. The application of the Sherman Act to limit the free expression of ideas by the public and interested groups, the right to petition, in order to give information, whether pertinent or impertinent, to their legislators and legislatures, would foil the legislative processes which consist in a large part of the balancing of conflicting interests and influences. In this field limitation is the equivalent of prohibition for if persons exercising their right to petition are to be subject to prosecution under the Sherman Act or to damages in civil suits under the Clayton Act, or go in fear of such prosecution or such suits, these persons will not [fol. 264] exercise the right to petition and a fundamental constitutional right will be limited or destroyed. Sources of information now open to legislators as to pertinent conflicting interests will be choked-off or obliterated. The scope of the Sherman Act has been greatly enlarged in recent years and it is indeed a flexible statute but I cannot conceive that Congress intended it to be applied to limit or prohibit free access to legislatures or to the inducing of legislative action by private activity.

Moreover, in the instant case the exercise of State police or taxing power is a most delicate area in the fine balance which must be preserved between the States and the National Government. The enactment of legislation in the two fields designated is peculiarly a concern of the States and the enactment of such laws by the legislatures is the last sanctuary of States' rights. Here another provision of the Constitution comes into play. The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." True, State police power has been curbed in the past by Congress by way of the Civil Rights Acts and State taxation has been limited by Congress where it has been

deemed to trench on interstate commerce. And see again the quotation[9] from Mr. Chief Justice Stone's opinion in Parker v. Brown, *supra*, 317 U.S. at p. 351, where California had passed a proration statute which restricted competition among growers of raisins and also fixed prices. The principle enunciated is central to the Tenth Amendment for one must always ask oneself, as indicated above, how a State legislature could legislate effectively without information or petitions from those affected by legislation? The argument made by the Truckers in substance is that State action is not being affected but only nefarious conduct by those who induced State action is being curbed. It would seem that action by the State under the circumstances at bar must surely cauterize action by individuals. But if the great liberties [fol. 265] guaranteed by the Constitution must be exercised reasonably, surely the circumstances presented here do not warrant limitation of the right to petition by the Sherman Act. I believe that Congress did not intend or even contemplate such a result.

As to Damages.

The court below, as I grasp the contents of its opinion, has concluded that because the Railroads and Byoir embarked on a "Campaign of Vilification" against the Truckers legal damage resulted to them in the form of loss of "good will".[18] The court divided "good will" into two categories: first, good will of the Truckers in respect to their customers, injury by way of loss of business, and, second, loss of the good will of the public, the injury being defined in terms of disability "to avoid the imposition of crippling burdens and restrictions".[19] By stipulation it was agreed by the

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[18] The court below stated: ". . . [A] real private injury to the truckers was accomplished. There was definitely a loss of good will to the trucking industry and in some instances that loss of good will was extreme." 155 F. Supp. at p. 810 ("Summary").

[19] The court stated: "[T]he use of the term 'good will' . . . relates not only to the direct damage done to the truckers, i.e., the refusal of truck users, because of the campaign, to avail themselves of that form of transportion (loss of business), but refers also to the more subtle type of injury done the entire

parties that the only damages claimed by the Truckers were those resulting from gubernatorial veto of certain legislation.[20] Single damages, subsequently trebled were [fol. 266] awarded to PMTA. These were assessed on the basis principally of the money, $217,358, spent by PMTA, through Allied Public Relations Associates, for "defensive measures", measures employed by PMTA to aid the Truckers, including the prosecution of the suit at bar. The monies which PMTA spent were expended for the very purposes for which they were contributed by the Truckers to PMTA.[21]

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trucking industry by discrediting it in the eyes of the general public, the 99% users of the highways, and eliminating the likelihood of public appreciation of the trucking industry as such or sympathy with the truckers' position which would be fundamental in gaining general public support to avoid the imposition of crippling burdens and restrictions." 155 F. Supp. at p. 810-811 ("Summary").

[20] Section 3 of the Stipulation is as follows: "The only damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law in 1955."

The court took the position that the section of the stipulation quoted limited the money value of the Truckers' claims but not the nature of their claims. This was an erroneous interpretation of the stipulation. The Truckers called to testify conceded that their respective businesses had been harmed only by the legislative action or inaction that the Railroads and Byoir had effected. At pre-trial conference it was stipulated that the Truckers who had not testified as to this issue would give similar evidence. Following this agreement the stipulation set out in Section 3, *supra*, was entered into. The distinction made by the court between the nature of the damage and the scope of the damage money-wise is invalid and also does violence to the intent of the parties.

[21] See opinion on damages. 166 F. Supp. at pp. 166-168. As has been indicated PMTA is a Truckers' service organization. There is nothing in the record which would support its right to maintain a class suit, real or "spurious", on behalf of the Truckers. No satisfactory theory appears under which PMTA can be held to be entitled to maintain a suit in a representative capacity. See Rule 23, Fed. R. Civ. Proc., 28 U.S.C. Cf. United States v. Association of American Railroads, 4 F.R.D. 516 (N.D. Neb. 1945).

It appears therefore that these expenditures made by PMTA were in reality paid for by the Truckers and that PMTA was a mere agent or conduit for the sums expended. I therefore can perceive no basis for the reimbursement of these sums to PMTA by way of allowance of damages to PMTA.

Moreover, the court below, while expressly refusing to allow damages to the Truckers because of the successful efforts of the Railroads and Byoir in defeating legislation sought by the Truckers, nonetheless allowed each of the Truckers nominal damages of six cents, trebled, eighteen cents, because of the Railroads' and Byoir's bad conduct. Since the court below held that no legally cognizable damages could ensue from acts entirely governmental[22] no legal foundation to support these nominal awards appears.

A substantial counsel fee was also allowed to counsel for the PMTA. This award also must fall if the judgment is reversed as I believe it must be.

I am also of the opinion that the injunctive relief granted under Section 16 of the Clayton Act is without justification. [fol. 267] My conclusion in this regard is not based on any alleged abuse of legal discretion by the court below. It rests on the broad ground that no facts were proved which, under the antitrust laws, could justify the injunctive relief granted.

In conclusion, on the issue of damages, it is desirable, although perhaps not necessary, to comment briefly on the approach of the court below to loss of "good will" as elements of damage. If damages are to be recovered under Section 1 (or for that matter, under Section 2) of the Sherman Act in conjunction with Section 4 of the Clayton Act, there must be proof of damage. As to the loss of good will by the Truckers, business-wise in respect to their customers as defined by the court below, quoted in note 19 *supra*, it is clear there was no showing of any loss of business by any individual Trucker. None of the Truckers had or could have a legally protected interest in the good will of the trucking industry as a whole. Cognizable injury under the Sherman Act must be to some "business or property", *i.e.*, a violation

[22] See 155 F. Supp. at pp. 834-835.

of some property right or business which is recognized by the law.[23] The court below took the position that the trucking industry is a legal entity possessing a cognizable interest in a kind of general good will belonging jointly to all Truckers in the suing group. But the suit at bar is a private antitrust suit. No joint right whatsoever is involved and each Trucker must maintain and vindicate his own separate and individual right.[24] There can be no good will in gross. There is no evidence that any of the Truckers individually suffered or was threatened with any injury to his good name or to his business reputation. This element of damage at-[fol. 268] tempted to be proved by the Truckers was shown to be completely lacking in factual foundation.

For the reasons stated I must dissent. I would reverse the judgment of the court below save only as to that portion of it which denies relief under the counterclaims.

[23] See Harrison v. Paramount Pictures, 115 F. Supp. 312, 316, 317 (E.D. Pa. 1953), aff'd *per curiam* on the opinion below, 211 F.2d 405, (3 Cir. 1954); Melrose Realty Co. v. Loew's Inc., 234 F.2d 518 (3 Cir. 1956), cert. denied, 352 U.S. 890 (1956).

[24] See Hess v. Anderson Clayton & Co., 20 F.R.D. 466 (S.D. Cal. 1957); Weeks v. Bareco Oil Co., 125 F.2d 84 (7 Cir. 1941); Kainz v. Anheuser-Busch, Inc., 194 F.2d 737 (7 Cir. 1952); Bascom Launder Corp. v. Telecoin Corp., 9 F.R.D. 677 (S.D.N.Y. 1950); and Farmers Co-op Oil Co. v. Socony Vacuum Oil Co., 133 F.2d 101 (8 Cir. 1942).

[fol. 269] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 12,750 and 12,751

NOERR MOTOR FREIGHT, INC., et al., Appellants in 12,750,

vs.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al., Appellants in 12,751.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

Present: Biggs, Chief Judge, and McLaughlin and Staley, Circuit Judges.

JUDGMENT—December 10, 1959

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the decree of July 22, 1958 and the order of July 31, 1958 in this cause be, and they are hereby affirmed, with costs.

December 10, 1959

[fol. 270] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 271]

SUPREME COURT OF THE UNITED STATES

No. 758, October Term, 1959

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,
Petitioners,

vs.

NOERR MOTOR FREIGHT, INC., et al.

ORDER ALLOWING CERTIORARI—April 18, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.